Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida,

Petitioner,

v.

LOGGERHEAD TURTLE (Caretta caretta); GREEN TURTLE (Chelonia mydas), et al., SHIRLEY REYNOLDS and RITA ALEXANDER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY D. KEINER
GRAY, HARRIS & ROBINSON, P.A.
Florida Bar No. 181678
201 East Pine Street, Ste. 1200
Post Office Box 3068
Orlando, FL 32802-3068
407-843-8880
Co-Counsel for Petitioner

DANIEL D. ECKERT
County Attorney
County of Volusia
Florida Bar No. 180083
123 W. Indiana Avenue
DeLand, FL 32720-4613
904-736-5950
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22488

QUESTION PRESENTED

Whether a county government can be held responsible under the Endangered Species Act by a federal court for the acts of private citizens by its failure to regulate beachfront lighting.

LIST OF PARTIES

The caption to this case contains a list of all parties to the proceedings below with the exception of the Leatherback Turtle (*Dermochelys coriacea*), which has been added as a party.

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PETITION FOR WRIT OF CERTIORARI

The County Council of Volusia County, Florida, a political subdivision of the State of Florida, respectfully petitions for a Writ of Certiorari to review the judgment in this case of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the Court of Appeals for the Eleventh Circuit denying rehearing was not reported. It is reprinted in the appendix at App. 121.

The opinion of the Court of Appeals for the Eleventh Circuit sought to be reviewed is reported at 148 F.3d 1231 (11th Cir. 1998) and is reprinted in the appendix at App. 1-69.

The order of the United States District Court for the Middle District of Florida granting petitioner's motion to dissolve injunction and dismiss case was not reported. It is reprinted in the appendix at App. 70-76.

The order of the district court denying petitioner's motion for partial summary judgment as to beachfront lighting ordinances and plaintiff's motion for leave to amend and add party was not reported. It is reprinted in the appendix at App. 77-89.

The order of the district court on plaintiff's motion for preliminary injunction was reported at 896 F.Supp. 1170 (M.D. Fla. 1995). It is reprinted in the appendix at App. 90-120.

JURISDICTION

The court of appeals issued its decision reversing the district court on August 3, 1998. Petitioner timely filed a suggestion for rehearing *en banc*, that was denied on October 16, 1998. App. 121. Under Eleventh Circuit Rule 35-36, a suggestion for rehearing *en banc* is also a motion for rehearing by the panel.

Petitioner invokes this Court's jurisdiction to review the opinion of the Eleventh Circuit under 28 U.S.C. §1254(1).

STATUTORY, CONSTITUTIONAL PROVISIONS AT ISSUE

Title 16, United States Code, Section 1531(a)(5), App. 122.

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Title 16, United States Code, Section 1540(c)(e)(f)(g), App. 134-40.

Tenth Amendment, United States Constitution, App. 141.

Eleventh Amendment, United States Constitution, App. 141.

Article VIII, Section 1(c), Florida Constitution, App. 142.

Article VIII, Section 1(g), Florida Constitution, App. 142.

STATEMENT OF THE CASE

This case involves the question of whether the duty to implement the Endangered Species Act falls upon local government. The Eleventh Circuit has held that a county has that obligation where it has legislative authority to establish environmental standards, and has declared a statutory cause of action for " 'harmfully' inadequate regulation." App. 41.

Petitioner is a county on Florida's east coast which under the provisions of the state constitution, Article VIII, Section 1(c), Florida Constitution [App. 142] has adopted a home rule charter. In 1986, a citizen review commission proposed, and the people of the county approved, two charter amendments pertinent to this litigation.

One charter amendment, Section 205 [App. 144-6], transferred regulatory control of the beach from upland municipalities to the county. The charter amendment declares access to the beach for recreation and other customary uses to be a right of the public. *Cf. City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73 (Fla. 1974)

(recognizing public right to use of beach established by custom). The charter instructs petitioner that because prohibiting motor vehicle access to the beach would deny access to the beach to many, it shall authorize as permitted by law[1] vehicular access to the beach to portions not reasonably accessible from public parking facilities.

A second amendment, Section 202.4 [App. 143], required petitioner to establish minimum standards for the protection of the environment. A minimum standard adopted under this provision of the charter prevails over a conflicting municipal ordinance. Article VIII, Section 1(g), Florida Constitution; Section 202.4, Volusia County Home Rule Charter. The amendment gives examples of potential regulatory areas.

Petitioner adopted by ordinance various minimum environmental standards, including one pertaining to sea turtle protection not in the charter list. [App. 147-59] The sea turtle minimum standard regulates artificial lighting that is upland of the beach. The standard divides lighting into that which is publicly and privately owned. It separates privately owned lighting into that which is part of development existing before July 1, 1990, (existing) and constructed or renovated after that date (new). The standard declares most of the county's coastline (approximately 49 miles, including a state park at the north and part of a federal park at the south) to be a sea turtle nesting area; however, the legislative finding omits in the

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[1] Section 161.58(2), Florida Statutes (1985), adopted the year prior to the charter amendment prohibited motor vehicle traffic on the beach except where authorized by the local governing body.

middle the most highly urbanized coastal portion (approximately 10 miles) consisting of the cities of Daytona Beach and Daytona Beach Shores. New development is required to conform to a lighting standard set out in the ordinance on the entire coastal beach. Existing construction is required to meet a retrofitting standard applicable only within the defined sea turtle nesting area.

In June 1995, respondents, pursuant to the citizen standing provisions of 16 U.S.C. §1540(g), filed an action for injunctive relief against petitioner, invoking the jurisdiction of the district court under 16 U.S.C. §1540(c). The complaint alleged a violation of the Endangered Species Act, 16 U.S.C. §1538(a)(1)(B), in two respects: (1) by the adoption of an ordinance permitting motor vehicle traffic upon the beach which caused take of protected species of sea turtles; and (2) by the adoption of a minimum standard regulating artificial lighting to an insufficient degree to prevent harm of such protected species. App. 160-80.[2] Respondents complained both as to the adequacy of the lighting standard for new development, and the geographic coverage of that for existing development.

The district court entered an order, App. 90-120, granting a preliminary injunction with respect to vehicular traffic. The court found that petitioner was legally responsible for the presence of motor vehicles on the beach. It further found that there was sufficient basis to conclude that harm to turtles from vehicles was likely

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[2] Pursuant to the opinion of the court of appeals, the complaint has been amended to add a third protected turtle species, the Leatherback Turtle. The allegations of the amended complaint are materially the same with this addition. App. 181-204.

unless they were restrained from driving or parking within a conservation zone defined under petitioner's beach and dune minimum standard. Petitioner did not contest that holding. In the same order, the district court denied a preliminary injunction as to lighting. It concluded that the challenged county ordinance did not by itself violate the act, and that it could be stricken under the Supremacy Clause even if it did. Consistent with petitioner's position here, the district court found that it had no authority to compel the enactment of a particular ordinance protecting turtles. App. 114.

Petitioner subsequently obtained an incidental taking permit from the United States Fish and Wildlife Service under the provisions of 16 U.S.C. §1539(a). Under this section, the holder of a permit from the United States Fish and Wildlife Service is insulated from liability for a taking within the scope of the permit. Petitioner then moved to dissolve the preliminary injunction and for entry of final judgment. Respondents conceded that the permit rendered the driving issue moot, but opposed the motion as to lighting. The district court granted petitioner's motion. App. 70-76. The court found that prohibited harm to turtles from artificial lighting was likely, but that it was within the scope of the permit. It reasoned that the Fish and Wildlife Service had imposed mitigation requirements so broad they exceeded the court's own authority. The court also found that by inclusion in the permit of a comprehensive plan to manage and document potential takings from artificial lighting, the Service had the clear intention to monitor harm from artificial lighting and amend the permit if necessary to provide for any taking. The court therefore dissolved the preliminary injunction and dismissed the case.

Respondents appealed the district court's order. The Eleventh Circuit by majority opinion reversed and found that respondents had standing to prove that the petitioner's alleged insufficient regulation of artificial lighting constituted a taking under the act by petitioner. App. 1-69. Chief Judge Hatchett reasoned for the court that petitioner has legislative authority over private beachfront lighting, App. 41; and permits what it does not prohibit. App. 47. Petitioner's "indirect control over lighting," App. 45, was a sufficient basis to hold it accountable for any resulting harm to turtles. App. 45, 51-52. The court of appeals "assum[ed], without deciding, that ordering Volusia County to implement and enforce county-wide a 'turtle friendlier' ordinance would violate the separation of powers . . . " App. 54. However, the court stated that, it "need only find constitutional at least one available remedy that would adequately bring about Volusia County's compliance with the ESA." App. 53. In the court's view, such included: (1) ordering the extension of the minimum standard ("strike . . . the exemption," App. 55) for existing construction to Daytona Beach and Daytona Beach Shores; and (2) declaring the minimum standard insufficient to prevent harm and ordering petitioner to form a committee to propose a solution. App. 55.

In strong dissent, Judge Roney concluded that it is:

> a serious mistake, a waste of government resources and an unjust expense to the parties to run parallel litigation of the same issues in the district court while the problem is under the management of a federal agency. App. 67.

REASONS FOR GRANTING THE WRIT

Twice this decade the Court has struck down portions of federal laws which intruded upon authority reserved to the states under the Tenth Amendment. *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, ___U.S.___, 117 S.Ct. 2365, 138 L.Ed. 3d 914 (1997). The decision of the court of appeals, that petitioner may violate the Endangered Species Act by failing to adopt local regulation vigorous enough to prevent harm to turtles by privately owned lights, construes this important federal legislation to do the same.

In *New York, supra*, this Court considered the extent to which under the Tenth Amendment Congress may use the states as implements of regulation. The Court reviewed three parts of the Low Level Radioactive Waste Policy Amendments Acts of 1985, Pub.L. 99-240, 99 Stat. 1842, 42 U.S.C. §§2021B, et seq. One of these, referred to as a take title provision, offered state government a choice of regulating radioactive waste according to the direction of Congress or accepting title and responsibility for it.

Justice O'Connor's majority opinion begins its analysis:

> Congress exercises its conferred powers subject to the limitations in the Constitution . . . The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, . . . , is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve powers to

> the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.
>
> The benefits of this federal structure have been extensively cataloged elsewhere, . . . but they need not concern us here . . . "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." *United States v. Butler*, 297 U.S. 1, 63, 56 S.Ct. 312, 318, 80 L.Ed. 477 (1936). *New York, supra*, at 156-7.

Turning to the question of "whether Congress may direct or otherwise motivate the States to regulate in a particular field or in a particular way," *Id.* at 161, the *New York* majority pointed to principles which guided the way:

> As an initial matter, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264, 288, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1 (1981)." *New York, supra*, at 161.

The regulation at issue in *Hodel*, the Surface Mining Control and Reclamation Act of 1977, was upheld precisely because it did not "commandeer" the states into regulation. The act did not compel the states to enforce a federal standard, expend state funds, or participate in the federal regulatory program.

The *New York* majority recalled this Court's observation in *FERC v. Mississippi*, 456 U.S. 742 (1982), that it "never has sanctioned explicitly a federal command to

the States to promulgate and enforce laws and regulations. *Id.* 456 U.S., at 761-762." *New York, supra,* at 161. However, as in *Hodel,* the federal statute in *FERC* encouraging state energy programs was found not to violate this standard. In the opinion of the *New York* Court, *FERC* and *Hodel* did not break new ground since "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York, supra,* at 162. This is so because "the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States . . . " *Id.* at 165. *New York* summarizes:

> In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States . . . [T]he Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those act. *Id.* at 166.

New York recognized, of course, as does petitioner, that there are methods that fall short of coercion by which Congress may urge a state or local government to adopt a legislative program consistent with federal interests. The Court approved two methods utilized in the Radioactive Waste Acts as within a grant of power to Congress and not intruding on state sovereignty. The first is Congress' authority under its spending power to attach conditions. The second is Congress' prerogative under the Commerce Clause to offer states the choice of regulating an activity

according to federal standards or having state law preempted by federal regulation. Congress may permissibly encourage state regulation by these methods or others where the states retain their choice to comply. *Id.* at 168. However, the Court found both alternatives of the third part of the Acts, the take title provision, requiring Congressionally directed regulation of low level radioactive waste or assumption of its title, to be unconstitutional and the combination to be coercion. An "Act of Congress directing the States to assume the liabilities of certain state residents," *Id.* at 175, commandeered the state's authority as much as a requirement to regulate in a particular manner.

Five years later in *Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365, 138 L.Ed. 3d 914 (1997), the Court stated:

> We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that *Congress cannot* circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. *Id.* at 2384.

The teaching of these cases should have controlled the decision of the court of appeals, but did not. Instead the court construed the Endangered Species Act so that petitioner is offered the following coercive choice: adopt local regulations which prevent harm to endangered species (i.e., regulate as directed by Congress) or be itself the legal cause of harm under the Act (i.e., assume liability

for the actions of private citizens), the same unconstitutional offering as in *New York*. Other circuits have found regulatory permission for private conduct in violation of the act. *Cf., Defenders of Wildlife v. Administration, Environmental Protection Agency*, 882 F.2d 1294 (8th Cir. 1989) (federal agency caused take by decision to register pesticides); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), *cert. denied*, ___ U.S. ___ (1998) (state permitting of fishing causes take when it licenses in precisely a manner that is likely to cause violation of Endangered Species Act). However, the Eleventh Circuit's decision marks an unwarranted departure from the principle of those cases. It substitutes the absence of local legislative control (" 'harmfully' inadequate regulation," App. 41) for express regulatory authorization of the harmful conduct. The court thus significantly alters petitioner's obligation to the adoption of a local ordinance which mirrors the Endangered Species Act, and assumes a judicial responsibility to see to it that standard is met.[3]

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[3] The argument made here, that an elective home rule process has been judicially commandeered, was expressed below in terms of redressability and separation of powers. *See* App. 53-54. At the outset of this case, the district court had declined to read the Endangered Species Act in a manner compelling enactment of a particular ordinance without direction from higher courts. App. 114. In spite of this, the Eleventh Circuit brushed aside the Tenth Amendment, the Eleventh Amendment and closely related federalism concerns as, in its view, not having been raised. App. 53, n.26. Petitioner respectfully submits that it is the opinion of the Eleventh Circuit itself which crystallized the issue under the Tenth Amendment, which as this Court has observed is a tautology as to federal powers. *New York, supra*, at 157.

In petitioner's view, the Eleventh Circuit's construction of the Endangered Species Act is incorrect. Nothing within the act permits, let alone requires, a result which requires petitioner to adopt a particular (or any) local regulatory scheme in order to avoid liability. The act declares its terms to be preemptive, not coercive. 16 U.S.C. §1535(f).[4] *Cf. New York, supra,* at 173-4. ("[W]e have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.") It imposes upon federal agencies the responsibility for its implementation, 16 U.S.C. §1531(c)(1); and enforcement, 16 U.S.C. §1540(e). Management and cooperation agreements are authorized for the Secretary of the Interior, but not required of the states, 16 U.S.C. §§1535(b), (c), whose participation in conservation programs is encouraged, 16 U.S.C. §1531(a)(5). The Secretary is authorized to provide financial assistance to a state which has entered into a cooperative agreement. 16 U.S.C. §1535(d). *Cf. New York,*

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[4] (f) Conflicts between Federal and State Laws

Any state law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void . . . This *chapter shall not* otherwise *be construed to void any State law or regulation* which is intended to conserve . . . wildlife . . . *Any State law* or regulation respecting the taking of an endangered or threatened species *may be more restrictive* than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter *but not less restrictive* than the prohibitions so defined. [Emphasis supplied]

supra, at 173 (conditional funding grant within authority of Congress under Commerce and Spending Clauses). The act thus rests comfortably upon its own terms within the principles set forth by this Court in *New York*.

Only when the act is read as it has been by the Eleventh Circuit, so that petitioner may be held in violation for its alleged failure to enact a local implementing ordinance, does it become coercive and an intrusion upon state authority. The Endangered Species Act should not have requirements read into it which, had they been adopted by Congress, would violate the Tenth Amendment.

The Eleventh Circuit's majority opinion is further flawed by its premise that petitioner's failure to regulate grants permission for harmful private beachfront lighting. The Endangered Species Act does not depend upon local adoption for its governance. Conversely, the absence of a county ordinance does not make conduct lawful which Congress has forbidden.

The decision of the Eleventh Circuit destabilizes the case law under the Endangered Species Act; sanctions federal commandeering of state regulation; discourages local environmental programs; transforms the role of the courts in the administration of the act; and merits the exercise of the supervisory authority of this Court.

CONCLUSION

Petitioner respectfully submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

DANIEL D. ECKERT, Esq.
County Attorney
FL Bar No. 180083
123 W. Indiana Avenue
Deland, FL 32720
904-736-5950
Counsel of Record

JEFFREY D. KEINER
GRAY, HARRIS & ROBINSON, P.A.
FL Bar No. 181678
201 East Pine Street, Ste. 1200
Post Office Box 3068
Orlando, FL 32802-3068
407-843-8880
Co-Counsel for Petitoner

[PUBLISH]

IN THE UNITED STATES COURTS OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-2083

D.C. Docket No. 95-587-CIV-ORL-22

LOGGERHEAD TURTLE (Caretta caretta);
GREEN TURTLE (Chelonia mydas), et al.,

Plaintiffs-Appellants,

versus

THE COUNTY COUNCIL OF VOLUSIA
COUNTY, FLORIDA, a political subdivision
of the State of Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(August 3, 1998)

Before HATCHETT, Chief Judge, RONEY and CLARK, Senior Judges.

HATCHETT, Chief Judge:

The loggerhead sea turtle (*Caretta caretta*) and green sea turtle (*chelonia mydas*) with appellants Shirley Reynolds and Rita Alexander (collectively the Turtles) challenge the district court's dismissal of their case brought pursuant to the Endangered Species Act (ESA),

16 U.S.C. §§ 1531-1544 (1994). They present: (1) an issue of first impression, whether the incidental take permit exception to the ESA's "take" prohibition applies to an activity performed as a purely mitigatory measure upon which the issuing agency conditions the permit; (2) an issue of standing, whether a governmental entity's regulatory control of minimum wildlife protection standards can cause redressable injury to protected wildlife in locations where non-party governmental entities possess supplemental authority to regulate and/or exclusively control enforcement; and (3) an issue of pleading amendment, whether another federally protected sea turtle should have been allowed to join the Turtles as a party. We reverse on all issues and remand for further proceedings.

I. BACKGROUND

In 1978, the United States Fish and Wildlife Service (Service) listed the loggerhead sea turtle as a threatened species and the green sea turtle as an endangered species. *See* 50 C.F.R. § 17.11(h) (1997).[1] Adjoining the Atlantic Ocean for nearly forty miles in northeast Florida, Volusia County's beaches play host to both humans and sea turtles. From north-to-south, its beach communities include Ormond-by-the-Sea, Ormond Beach, Daytona Beach, Daytona Beach Shores, Wilbur-by-the-Sea, Town of Ponce Inlet, City of New Smyrna Beach and Bethune Beach.[2]

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[1] The green sea turtle is endangered in Florida and along the Pacific coast of Mexico. In all other locations, it is "threatened." 50 C.F.R. § 17.11(h).

[2] Daytona Beach and Daytona Beach Shores are the most urbanized beach communities.

Female adult sea turtles come ashore in the spring, deposit eggs in the sand and return to the ocean. Months later, when sea turtle hatchlings break out of their shells at night, they instinctively crawl toward the brightest light on the horizon. On an undeveloped beach, the brightest light is the moon's reflection off the surf. On a developed beach, the brightest light can be an inland artificial source.

On June 8, 1995, the Turtles instituted this lawsuit in the United States District Court for the Middle District of Florida under the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g)(1)(A). Seeking declaratory, permanent injunctive and – in a separate, contemporaneously-filed motion – preliminary injunctive relief, the Turtles alleged that appellee County Council of Volusia County, Florida's (Volusia County) "refusal to ban beach driving during sea turtle nesting season and ban beachfront artificial light sources that adversely impact sea turtles" violates the ESA's "take" prohibition, 16 U.S.C. § 1538(a)(1)(B). The Turtles quoted excerpts from their federally-issued recovery plans that "[a]rtificial beachfront lighting from buildings, streetlights, dune crossovers, vehicles and other types of beachfront lighting have been documented in the disorientation (loss of bearings) and misorientation (incorrect orientation) of hatchling turtles" and that

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We have omitted any discussion of the beach community of Silver Sands because the parties do not specifically mention it in their briefs or the record. It may be that Silver Sands is another unincorporated area like Wilbur-by-the-Sea, Ormond-by-the-Sea and Bethune Beach, since that list does not appear to be an exhaustive one. The parties can resolve this minor detail on remand.

"nesting females avoided areas where beachfront lights were the most intense" or "abort[ ] nesting attempts at a greater frequency in lighted areas." (Quoting United States Fish & Wildlife Serv., Dep't of the Interior; Nat'l Marine Fisheries Serv., Dep't of Commerce, Recovery Plan for U.S. Population of Loggerhead Turtle (*Caretta caretta*) (1991), at 6-7; United States Fish & Wildlife Serv., Dep't of the Interior; Nat'l Marine Fisheries Serv., Dep't of Commerce, Recovery Plan for U.S. Population of Atlantic Green Turtle (*chelonia mydas*) (1991), at 4-5.) As exhibits, the Turtles advanced reports of fatal "disorientations" and "misorientations," as well as "false crawls" (aborted nesting attempts) that volunteer "Turtle Patrol" members had witnessed throughout Volusia County.

Volusia County's initial response to the complaint was twofold. First, on July 12, 1995, it answered the complaint. Second, on July 16, 1995, it applied to the Service for an "interim" incidental take permit. See 16 U.S.C. § 1539(a). After a hearing, the district court granted in part the Turtles' motion for a preliminary injunction as to beach driving, but denied preliminary relief as to artificial beachfront lighting. *See Loggerhead Turtle v. County Council of Volusia County, Fla.*, 896 F. Supp. 1170, 1178-83 (M.D. Fla. Aug. 1, 1995).[3]

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[3] Finding a reasonable likelihood that beach driving takes loggerhead and green sea turtles, the court preliminarily enjoined Volusia County from permitting vehicles on the beach from one hour before sunset until one hour after sunrise. The court excepted from the injunction "County vehicles which are equipped with yellow or 'turtle-friendly' headlights." 896 F. Supp. at 1182. Without exception, the court enjoined Volusia County "from permitting any vehicle to enter the 'conservation zone.' " 896 F. Supp. at 1182.

In September 1995, the district court entered a pretrial order that: (1) set a deadline of November 1, 1995, for the parties to file motions to amend and add parties; (2) closed discovery on February 1, 1996; and (3) scheduled trial for April 1996. On October 27, 1995, the Turtles filed a motion for leave to amend their original complaint to add the leatherback sea turtle (*Dermochelys coriacea*) as a party, attaching the proposed amended complaint and two exhibits to the motion. During the pendency of the Turtles' motion for leave to amend, Volusia County successfully moved to continue the trial until October 1996, citing the imminence of the Service's permit decision.

Prior to the close of discovery, Volusia County moved for partial summary judgment. The county argued that the Turtles lacked standing to assert claims for takes in non-party municipalities that regulate and enforce their own lighting restrictions. On July 9, 1996, the district court granted the motion, concluding that: (1) the Turtles failed to show any causal connection between Volusia County's regulatory acts and the alleged takes; and (2) the court lacked the power to redress the alleged injury without joinder of those municipalities as defendants.

In the same order, the district court denied the Turtles' motion for leave to amend, reasoning that: (1) the court lacked subject matter jurisdiction over the leatherback sea turtle since it was unable to locate a copy of the Turtles' notice of intent to sue letter that their motion referenced; (2) the Turtles unduly delayed in filing the

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The Turtles subsequently moved the district court to reconsider its denial of preliminary injunctive relief as to artificial beachfront lighting, but the court denied the motion.

motion; and (3) Volusia County would be prejudiced if the court extended the preliminary injunction to include the leatherback sea turtle whose nesting season starts earlier every spring.

After Volusia County obtained another trial continuance, the Service issued the county an incidental take permit on November 21, 1996. The next day, Volusia County moved the district court to dissolve the preliminary injunction and dismiss the Turtles' case, contending that the permit mooted further proceedings. Although conceding that the permit authorized incidental takes through beach driving, the Turtles contended that it did not authorize incidental takes through artificial beachfront lighting. The district court agreed with Volusia County and closed the case. This appeal follows.

II. ISSUES

We address three issues: (1) whether the district court erred in concluding that Volusia County's incidental take permit excepted it from liability for taking protected sea turtles through artificial beachfront lighting; (2) whether the district court erred in concluding that the Turtles lack standing to sue Volusia County for takes that occur in the non-party municipalities of Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach that have supplemental authority to regulate and/or independently enforce their own artificial beachfront lighting restrictions; and (3) whether the district court abused its discretion in denying the Turtles' motion for leave to amend their original complaint to include the leatherback sea turtle as a party. Our standard of review

for the first two issues is *de novo*. *See Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Engineers*, 87 F.3d 1242, 1246 (11th Cir. 1996) ("We review questions of law *de novo* [.]"); *Engineering Contractors Ass'n of South Fla. v. Metropolitan Dade County*, 122 F.3d 895, 903 (11th Cir. 1997) ("[T]his Court reviews standing *de novo*."), *cert. denied*, 118 S. Ct. 1186 (1998); *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1404 (11th Cir. 1994) ("A district court's decision to grant or deny leave to amend is reviewed for abuse of discretion."), *cert. denied*, 513 U.S. 1113 (1995).

III. CONTENTIONS

As to the first issue, the Turtles contend that Volusia County's incidental take permit authorizes only incidental takes of sea turtles from beach driving, not from artificial beachfront lighting. The Turtles argue that to fall within the incidental take permit exception to the "take" prohibition, the Service's permission must be express and activity-specific. The Turtles also assert that the district court could not infer such permission from the Service's conditioning the permit on lighting-related mitigatory measures.

Volusia County responds that under the permit, it must survey every light source, study their impacts and implement methods to correct light sources that misorient sea turtles. Volusia County argues that given those extensive mitigatory requirements, the Service clearly contemplated that it be excepted from liability for any incidental takes that artificial beachfront lighting causes during the life of the permit.

With regard to the second issue, the Turtles contend that the court can fairly trace sea turtles' lighting-related "harm" in the non-party municipalities of Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach to Volusia County's regulatory acts. The Turtles claim that Volusia County exercises sufficient regulatory authority in imposing county-wide minimum artificial beachfront lighting restrictions and exempting Daytona Beach and Daytona Beach Shores from any such restrictions. Furthermore, the Turtles assert that the district court possesses the power to redress any and all lighting-related takes. To hold otherwise, the Turtles posit, would violate the accepted notion that both a person whose actions adversely affect a protected species and a governmental body that authorizes that person's actions can violate the ESA's "take" prohibition.

Focusing only on the municipalities of Daytona Beach and Daytona Beach Shores, Volusia County contends that takes in those locations are traceable only to those municipalities' independent regulatory and enforcement acts or omissions. According to Volusia County, the Turtles should have sued those municipalities if they believed that artificial beachfront lighting-related takes occurred on their beaches. Additionally, Volusia County argues that its lack of authority to regulate and enforce lighting restrictions in those municipalities left the district court without power to redress the alleged "harm." Moreover, Volusia County contends that the Turtles' requested relief, if granted, would effectively force it to pass a new ordinance or amend its existing one, violating the separation of powers.

Regarding the third issue, the Turtles assert that the district court should have "freely given" them leave to amend their complaint to add the leatherback sea turtle as a party. They contend that, contrary to the district court's findings: (1) they sufficiently notified both the Service and Volusia County of their intent to sue for takes of the leatherback sea turtle through artificial beachfront lighting; (2) they discovered new information after they filed the original complaint; and (3) Volusia County would not have been unduly prejudiced because the Turtles did not ask to amend the preliminary injunction and the parties included the leatherback sea turtle in discovery.

Volusia County responds that the Turtles' notice of intent to sue inadequately referred to the leatherback sea turtles as "nesting" on Volusia County beaches, as opposed to being "taken." Volusia County contends that the Turtles possessed evidence of takes at least three months prior to filing their motion for leave to amend. Finally, Volusia County points to the "additional expense and possible delay" that the Turtles' amendment would cause.

IV. DISCUSSION

Under the ESA, it is unlawful to "take" endangered or threatened wildlife unless a statutory exception applies. 16 U.S.C. § 1538(a)(1)(B) (1994) (the "take" prohibition); *see* 50 C.F.R. § 17.31(a) (1997) (the "take" prohibition applies to threatened as well as endangered wildlife). Defined broadly, "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect[.]" 16

U.S.C. § 1532(19); *see Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2416 (1995) ("Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions."). It is equally unlawful "to attempt to commit, solicit another to commit, or cause to be committed" a "take." 16 U.S.C. § 1538(g).

"Harass" and "harm," within the meaning of "take," are defined through regulation. The Secretary of the Interior, through the Service, has construed "harass" as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." 50 C.F.R. § 17.3; *see* 16 U.S.C. § 1533(d) (delegating regulatory authority to the "Secretary"); *Sweet Home*, 115 S. Ct. at 2410 & n.2 (noting that the Secretary of the Interior, through the Director of the Service, promulgated 50 C.F.R. § 17.3).

The crux of the Turtles' artificial beachfront lighting allegations centered on "harm," "an act which actually kills or injures wildlife" that may include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (the "harm" regulation).[4] At the

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[4] The Supreme Court recently upheld the regulatory definition of "harm" as a legitimate interpretation of the ESA's "take" prohibition. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2418 (1995) ("[B]ased on the text, structure, and legislative history of the ESA, . . . the

preliminary injunction stage, the district court found "overwhelming[ ]" evidence that artificial beachfront lighting "harms" sea turtles on Volusia County's beaches. 896 F. Supp. at 1180-81.[5] Similarly, at the summary judgment stage, the district court found a genuine factual dispute "as to whether the artificial beachfront lighting controlled by Volusia County is responsible for 'taking' sea turtles."[6]

A.

The incidental take permit exception to the "take" prohibition and its regulatory constructions, including the "harm" regulation, can be found in 16 U.S.C. § 1539(a). As relevant to this case, the Service "may permit, under such terms and conditions as [it] shall prescribe . . . any taking otherwise prohibited by section 1538(a)(1)(B) of [the ESA] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).[7] As a

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Secretary reasonably construed the intent of Congress when he defined 'harm' to include 'significant habitat modification or degradation that actually kills or injures wildlife.' ").

[5] The district court also concluded that the same evidence showed that artificial beachfront lighting "harasses" sea turtles.

[6] None of the parties contests these findings.

[7] The ESA assigns the "Secretary" the responsibility for issuing incidental take permits. *See* 16 U.S.C. § 1532(15) (defining "Secretary" to include the Secretary of the Interior, the Secretary of Commerce, and the Secretary of Agriculture), § 1539(a)(1). Because this case involves sea turtles on land, the Fish and Wildlife Service served as the issuing agency on behalf of the Secretary of the Interior. *See* 50 C.F.R. § 222.23(a) ("[T]he

prerequisite to receiving an incidental take permit, the applicant must submit a habitat conservation plan that specifies: "(i) the impact which will likely result from such taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures that the [issuing agency] may require as being necessary or appropriate for purposes of the plan." 16 U.S.C. § 1539(a)(2)(A).[8]

U.S. Fish and Wildlife Service has jurisdiction for sea turtles while the turtles are on land."); 50 C.F.R. § 17.22 ("[T]he Director [of the Fish and Wildlife Service] may issue a permit authorizing any activity otherwise prohibited by [50 C.F.R. § 17.21, the regulatory version of the 'take' prohibition], . . . for the incidental taking of endangered wildlife."); 50 C.F.R. § 17.32 (same with regard to threatened wildlife); *Hawksbill Sea Turtle v. Federal Emergency Mgt. Agency*, 126 F.3d 461, 470 (3d Cir. 1997) ("[W]hen the turtles are swimming in [Vessup Bay, Virgin Islands], Commerce bears regulatory responsibility, and when the turtles return to the beach, the regulatory baton passes to Interior."). The Secretary of Commerce, through the National Marine Fisheries Service, issues incidental take permits concerning certain marine-based fish and wildlife. *See* 50 C.F.R. § 217.2 ("Endangered species of fish or wildlife other than those covered by [50 C.F.R. §§ 216-227] are under the jurisdiction of the Secretary of the Interior."); 50 C.F.R. § 222.23(a) (listing species of fish and wildlife "currently under the jurisdiction of the Secretary of Commerce[,]" including "sea turtles while the turtles are in the water"); *Ramsey v. Kantor*, 96 F.3d 434, 438-40 (9th Cir. 1996) (discussing the National Marine Fisheries Service's issuance of an incidental take statement for commercial in-river salmon fishing).

[8] Although the ESA refers to this document as merely a "conservation plan," it is commonly referred to a [sic] "habitat

Service regulations further instruct the applicant to include a "complete description of the activity sought to be authorized" and "[t]he common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, if known[.]" 50 C.F.R. § 17.22(b)(1)(i)-(ii) (endangered wildlife); 50 C.F.R. § 17.32(b)(1)(iii)(A)-(B) (threatened wildlife).

Upon receiving a complete application package, the Service must publish notice in the Federal Register and provide the public an opportunity to comment on whether the Service should issue the permit. 16 U.S.C. § 1539(a)(2)(B); 50 C.F.R. § 17.22 ("The Director [of the Service] shall publish notice in the Federal Register of each application for [an incidental take permit]. Each notice shall invite the submission from interested parties, within 30 days after the date of the notice, of written data, views, or arguments with respect to the application."); 50 C.F.R. § 17.32(b)(1)(ii); *see, e.g.*, Notice of Receipt of an Application for an Incidental Take Permit, 61 Fed.Reg. 9716 (1996) (summarizing Volusia County's application). Upon expiration of the public comment period, the Service must issue the permit if it finds that:

> (i) the taking will be incidental;
>
> (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

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conservation plan." *Compare* 16 U.S.C. § 1539(a)(2)(A) *with, e.g.*, Notice of Availability of Final Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 61 Fed.Reg. 63854 (1996).

> (iii) the applicant will ensure that adequate funding for the plan will be provided;
>
> (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; . . .
>
> (v) the measures, if any, required under [16 U.S.C. § 1539(a)(2)(A)(iv)] will be met; [and]
>
> [the Service] has received such other assurances as [it] may require that the [habitat conservation plan] will be implemented[.]

16 U.S.C. § 1539(a)(2)(B); 50 C.F.R. § 17.22(b)(2); 50 C.F.R. § 17.32(b)(2).[9]

An incidental take permit "may authorize a single transaction, a series of transactions, or a number of activities over a specific period of time." 50 C.F.R. § 17.22; 50 C.F.R. § 17.32. Additionally,

> [t]he authorizations on the face of a permit which set forth specific times, dates, places, methods of taking, numbers and kinds of wildlife or plants, location of activity, authorize certain circumscribed transactions, or otherwise permit a specifically limited matter, are to be strictly construed and shall not be interpreted to permit similar or related matters outside the scope of strict construction.

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[9] The applicant must also be free of disqualifying factors, such as prior criminal or civil violations of federal wildlife statutes. *See* 50 C.F.R. § 13.21(b)-(c) (incorporated by reference into 50 C.F.R. §§ 17.22(b)(2), 17.32(b)(2)).

50 C.F.R. § 13.42; *see also* 50 C.F.R. § 220.42. Finally, the applicant's failure to comply "with the terms and conditions of the permit" requires the Service to revoke the permit. 16 U.S.C. § 1539(a)(2)(C).

We turn first to the Turtles' contention that Volusia County's incidental take permit does not expressly authorize takings through artificial beachfront lighting. Such express authority, if it exists, can be found only within the four corners of the permit. *See generally* 16 U.S.C. § 1539(a) (issuing official must "prescribe" the permit's "terms and conditions"). In its introductory headline, Volusia County's incidental take permit states that the Service "authorizes incidental take within the Defined Area or County Beaches, associated with the activities described in Condition F below, of [appellant loggerhead sea turtle, appellant green sea turtle, leatherback sea turtle, hawksbill sea turtle (*Eretmochelys imbricata*) and Kemp's ridley sea turtle (*Lepidochelys kempii*)] conditioned upon implementation of the terms and conditions of this Permit." Condition F, in turn, lists eleven "authorized" types of incidental take:

> F. The following types of incidental take are authorized herein, subject to the continued validity of this Permit:
>
> 1. Harassment, injury, and/or death to sea turtle eggs and/or hatchlings resulting from public and emergency and/or safety *vehicles* driving over unmarked/unprotected sea turtle nests located in designated traffic lane/driving area(s) or ramp [illegible] area(s) on County Beaches.

2. Harassment, injury, and/or death to sea turtle eggs and/or hatchlings resulting from emergency and/or safety *vehicles* driving over unmarked/unprotected sea turtles nests located within the Defined Area.

3. Harassment, injury, and/or death to sea turtle eggs and/or hatchlings resulting from emergency and/or safety *vehicles* driving over marked sea turtle nests located within the Defined Areas.

4. Harassment, injury, and/or death to hatchling sea turtles emerging from unmarked/unprotected nests and subsequently caught in *vehicle* ruts in areas where no rut removal has taken place.

5. Harassment, injury, and/or death to adult, hatchling, stranded, or post-hatchling washback [sic] sea turtles resulting from collisions with emergency and/or safety *vehicles* operating within the Defined Area; such vehicles may also disorient/harass adults and/or hatchling sea turtles with headlights while in motion or at rest for less than one minute, or harass adult sea turtles during nesting activity.

6. Harassment, injury, and/or death to adult female sea turtles attempting to nest in the Transitional and/or Urban Areas of the County Beaches between 8 a.m. and 7 p.m., resulting from collisions with *vehicles* operated by the general public.

7. Harassment, injury, and/or death to hatchling sea turtles emerging from the nest and/or crawling from the Transitional and/or Urban Areas of the County Beaches to the ocean between 8 a.m. and 7 p.m., resulting from collisions with *vehicles* operated by the general public pursuant to terms and conditions of this permit.

8. Harassment, injury, and/or death to post-hatchling sea turtles that have emerged from a nest and entered the ocean by having been washed back onto Transitional and/or Urban Areas of the County Beaches resulting from collisions with *vehicles* operated by the general public pursuant to terms and conditions of this permit.

9. Harassment, injury, and/or death to nesting female turtles attempting to nest in the Defined Areas, resulting from physiological stress of potentially increasing the number of false crawls during the nesting season, or from sand compaction due to *vehicles* operating within the Defined Area pursuant to the terms and conditions of this permit.

10. Harassment, injury, and/or death of sea turtle and/or hatchlings in unmarked/unprotected nests due to physical crushing by activities associated with (1) marking the established Conservation Zone in the Transitional and Urban Areas of the County Beaches; (2) placement of trash receptacles on County Beaches; (3) placement of portable toilets

> as outlined in the [habitat conservation plan]; and (4) beach maintenance activities, including ramp maintenance.
>
> 11. Harassment, injury, and/or death of sea turtle eggs and/or nests laid outside the normal sea turtle nesting season, May 1 through October 31, when a nest monitoring/marking program is not in place.

(Emphasis added.) Indisputably, these eleven types of incidental take relate only to vehicular access on Volusia County's beaches. None of the eleven authorized activities listed in Condition F concerns artificial beachfront lighting. The only form of lighting mentioned in Condition F is vehicular headlights.

Although the majority of its conditions concern beach driving, the incidental take permit does address artificial beachfront lighting. Condition G of the permit, entitled "Mitigation/Minimization Measures," lists fifteen categories of "measures [to] be employed by the Permittee to ensure that take is minimized and mitigated." These categories fall under the following general headings: 1) "Protected Species Beach Management Areas"; (2) "Tire Tracks/Rut Removal Program"; (3) "Driving Zone Delineation"; (4) "Operation of Non-Public Vehicles within Conservation Zones and Protected Species Beach Management Areas"; (5) "Placement and Maintenance of Portable Facilities"; (6) "Maintenance and Placement of the Conservation Zone Markers"; (7) "Nighttime Operation of Law Enforcement Safety Vehicles"; (8) "Special Beach Events"; (9) "Lifeguard Station Management"; (10) "Commercial Fishermen"; (11) "Beach/Access Ramp Maintenance and Cleaning"; (12) "Standards for Beach

Evacuation"; (13) *"Artificial Beachfront Lighting"*; (14) "Off-Beach Parking Plan"; and (15) "Species Management Program." (Emphasis added.) Most of these categories contain lengthy subcategories as well.

The mitigation measures relative to artificial beachfront lighting occupy less than two out of twenty-five pages of Volusia County's incidental take permit:

> 13. **Artificial Beachfront Lighting.**
>
> i. **Beachfront Lighting Management Plan**. By November [illegible date] 1997, the Permittee shall have developed a Beach Lighting Management Plan. The U.S. Fish and Wildlife Service must approve the Beach Lighting Management Plan prior to its implementation. The scope of work of the Beach Lighting Management Plan shall include, but is not limited to, the following items.
>
> a. Identify and map jurisdictional boundaries along the Volusia County coast.
>
> b. Categorize coastal areas of the County with respect to existing lighting environments. Categories will consider type and extent of upland development, amount and intensity of beachfront lighting, sea turtle nesting densities, and relative effort and expense required to meet appropriate lighting standards.
>
> c. Determine the adequacy of existing ordinances and codes within

each jurisdiction as well as the adequacy of related enforcement programs in protecting nesting and hatchling sea turtles from beachfront lighting.

d. Develop an approach for addressing lighting issues for each coastal lighting category. Where modifications are impractical or cost prohibitive, develop mitigation guidelines that will yield greater cost/benefit ratios.

e. Develop a protocol for detailed lighting evaluations along those sections of coastline where lighting modifications are feasible and cost effective.

f. If it is determined that lighting ordinances will be cost effective and can be practically implemented in the currently exempt areas of Daytona Beach and Daytona Beach Shores, then coordinate the development of new ordinances in those municipalities.

g. Develop a program for assisting coastal property owners in bringing lights into compliance with local ordinances or Florida Department of Environmental Protection guidelines.

h. Develop a generic public awareness program for promoting turtle-friendly lighting and voluntary

compliance with light management guidelines.

i. Develop a long-term program for annual maintenance lighting evaluations.

The time frame for developing scope of work for the Beach Lighting Management Plan is one year from adoption of the [habitat conservation plan]. The Beach Lighting Management Plan will be implemented during the second and third years following adoption. Lighting inventories will be conducted during the first year of implementation. The annual lighting maintenance program will be initiated during the third year after [habitat conservation plan] adoption, and a mitigation plan for uncorrectable lighting problems will be implemented during the fourth and fifth years following adoption.

ii. **Lighting Surveys**. By April 1, 1997, Permittee shall develop, with further consultation and assistance from the U.S. Fish and Wildlife Service and Florida Department of Environmental Protection, a methodology for implementing and citing light sources that disorient sea turtles. Permittee will conduct lighting surveys and compile lists of infractions for Code Enforcement action or referral to the U.S. Fish and Wildlife Service. Lighting surveys will be conducted monthly, at a minimum,

from April 1 through October 31 of each year.

iii. **County-owned and Operated Lights**. The Permitee will survey all beachfront lights owned or operated by Volusia County to identify those that are not in compliance with State guidelines. The Permittee will ensure that the individual responsible for surveying the lights coordinates with the U.S. Fish and Wildlife Service for concurrence with the results. Any lights deemed to be a problem for sea turtles as a result of the survey will be brought into compliance by the County. The U.S. Fish and Wildlife Service will be notified to conduct a survey to ensure compliance; Volusia County personnel or their contractor will be present for the survey. All of the above measures will take place prior to May 1, 1997.

iv. **Light Management Training**. By July 1, 1997, the Permittee will establish a training manual and hold at least two Permittee-sponsored workshops on lighting and beach crime to provide information on the effects of lighting in compliance with Volusia County Code protecting sea turtles and crime occurrences.

Condition G does not contain any language expressly authorizing takes of sea turtles through artificial beachfront lighting like that contained within Condition F.

In light of the foregoing, it is readily apparent that the incidental take permit exhaustively lists all authorized activities within Condition F and all mitigation measures within Condition G. Activities relative to driving on the beach are mentioned in both conditions. Activities relative to artificial beachfront lighting, however, are mentioned only in Condition G. Given the permit's structure, the express authority to take sea turtles through artificial beachfront lighting – if the Service had so intended – would be memorialized in Condition F. This absence is dispositive. Accordingly, Volusia County lacks the Service's express permission to take sea turtles incidentally through artificial beachfront lighting.

Volusia County argues that even if it lacks the Service's express permission, it has the Service's implied permission to take sea turtles incidentally through artificial beachfront lighting because the Service expressly conditioned the permit on Volusia County's implementation of detailed lighting-related mitigatory measures. This argument presents an issue of first impression in this and other circuits, whether the incidental take permit exception (16 U.S.C. § 1539(a)) to the "take" prohibition (16 U.S.C. § 1538(a)(1)(B)) applies to, and thus excepts from liability, an activity performed as a purely mitigatory measure upon which the Service conditions the permit. We hold that it does not.

The ESA's text and the Service's regulations provide every indication that incidental take permission must be

express and activity-specific. To be excepted from liability, the ESA mandates that the "take" be "incidental to . . . the carrying out of an . . . *activity*." 16 U.S.C. § 1539(a)(1)(B) (emphasis added). Moreover, in addressing the requirements of the habitat conservation plan, the ESA semantically separates the "action[ ]" at issue from the applicant's intentions to "mitigate" the taking. *Compare* 16 U.S.C. § 1539(a)(2)(A)(iii) ("what alternative actions to such taking the applicant considered") (emphasis added) *with* 16 U.S.C. § 1539(a)(2)(A)(ii) ("what steps the applicant will take to minimize and *mitigate* such impacts") (emphasis added). *See generally Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 984 (9th Cir. 1985) (separating semantically the activity for which the applicants sought an incidental take permit – a development "project" – from the mitigatory measures – "restrictions" on the development). Furthermore, before the Service issues an incidental take permit, the fact-finding official must resolve at least two statutorily distinct questions: (1) whether the *activity* will be free of purposeful takes; and (2) whether the applicant will *mitigate* the authorized takes' effect. *Compare* 16 U.S.C. § 1539(a)(2)(B)(i) ("the *taking* will be incidental") (emphasis added) *with* 16 U.S.C. § 1539(a)(2)(B)(ii) ("the applicant will . . . minimize and *mitigate* the impacts of such taking") (emphasis added).

The statutory dividing line between activities sought to be permitted and mitigatory measures is further reinforced in the Service's regulations. The Service requires applicants to describe completely "the *activity* sought to be authorized." 50 C.F.R. §§ 17.22(b)(1)(i), 17.32(b)(1)(iii)(A) (emphasis added); *see also* 50 C.F.R.

§ 222.22(b)(4) (incidental take permit applications to the National Marine Fisheries Service must include a "detailed description of the proposed *activity*") (emphasis added).[10] The incidental take permit, in turn, "may authorize a single transaction, a series of transactions, or a number of *activities*[.]" 50 C.F.R. §§ 17.22, 17.32 (emphasis added). Finally, the Service emphasizes that the "authorizations on the face of a permit which set forth specific . . . *methods of taking* . . . are to be strictly construed and shall not be interpreted to permit similar or related matters outside the scope of strict construction." 50 C.F.R. § 13.42 (emphasis added); *see also* 50 C.F.R. § 222.22(d) (incidental take permits that the National Marine Fisheries Service issues must "contain such terms and conditions as the Assistant Administrator deems necessary and appropriate, including . . . [t]he authorized *method of taking*") (emphasis added).

Even the Service's informal publication advises applicants to describe specifically "all *actions* . . . that . . . are likely to result in incidental take" so that the permit holder "can determine the applicability of the incidental take authorization to the *activities* they undertake." United States Fish & Wildlife Serv., Dep't of the Interior; Nat'l Marine Fisheries Serv., Dep't of Commerce, Habitat Conservation Planning Handbook (Nov.1996), at 3-12 to 3-13 (emphasis added). Otherwise, the Service warns, "broadly defined types of *activities* . . . generally would

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[10] Although the National Marine Fisheries Service did not issue the permit in this case, its regulations are substantially similar to those of the Fish and Wildlife Service.

not be authorized." Habitat Handbook, at 3-13 (emphasis added).[11]

The content of Volusia County's application and correspondence with the Service reflects the statutory and regulatory dividing line between authorized activities and mitigatory measures. In its initial application to the Service, Volusia County "complete[ly] describ[ed] . . . the activity sought to be authorized" as "vehicular access to Volusia County beaches[.]" (Citing 50 C.F.R. §§ 17.22(b)(1)(i).) A follow-up letter from a Service official acknowledging receipt of the application summarized that Volusia County sought "a permit to cover any incidental take of sea turtles that may occur on Volusia County beaches . . . as a result of *vehicular access* to county beaches." (Emphasis added.) Another follow-up letter from the Service pointedly expressed that

> it is important to state for the record that the County of Volusia is not seeking incidental take

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[11] We recognize that some language in this informal publication potentially contradicts our holding. The Service posits that "[w]hat is being authorized in [an incidental take] permit is incidental take, not the activities that result in the take." Habitat Handbook, at 3-12. Also, the Service opines that "actions that result in deliberate take can be conducted under an incidental take permit, *if*: (1) the take results from mitigation measures . . . specifically described in the [habitat conservation plan]; and (2) such activities are directly associated in time or place with activities authorized under the permit." Habitat Handbook, at 7-2. The Service's informal publications are, of course, not binding authority. *See CWT Farms, Inc. v. Commissioner*, 755 F.2d 790, 803-04 (11th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986). We also find these excerpts unpersuasive since they conflict with the publication's other provisions and the Service's duly-promulgated regulations.

> authority for marine sea turtles resulting from lights owned or operated by the County. The purpose of any such discussion in the habitat conservation plan . . . is to provide *mitigation* for impacts to marine sea turtles resulting from *permitted activities*. The [incidental take permit] application you submitted requests incidental take authority for sea turtle species from *beach-driving* and associated activities only.

(Emphasis added.) Finally, in a responsive letter to the Service, an assistant county attorney reiterated that "Volusia County is seeking an Incidental Take Permit for vehicles [sic] access to the beaches. However, Volusia County has addressed lighting throughout its permit application as a *mitigating* factor." (Emphasis added.)

Contrary to Volusia County's position, no published case law even purports to suggest that purely mitigatory measures fall within the scope of the incidental take permit exception, 16 U.S.C. § 1539(a). In *Ramsey v. Kantor*, the Ninth Circuit addressed whether the States of Oregon and Washington that were neither federal agencies nor applicants for an incidental take statement issued under 16 U.S.C. § 1536(b) may lawfully take federally protected fish without first obtaining an incidental take permit under 16 U.S.C. § 1539(a). 96 F.3d 434, 437 (9th Cir. 1996).[12] The court answered the question in the affirmative "provided the actions in question are contemplated

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[12] The Supreme Court recently explained the incidental take statement exception:

> If a [federal] agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the Fish and Wildlife Service, as delegate of the Secretary [of

by an incidental take statement issued under [16 U.S.C. § 1536(b)] and are conducted in compliance with the requirements of that statement." *Ramsey*, 96 F.3d at 442. Because the incidental take statement "clearly anticipated" that Oregon and Washington would regulate the fishing of unprotected salmon, the court held that those states were not liable for takes of endangered and threatened salmon that "intermingle with and are all but indistinguishable from" unprotected salmon. *Ramsey*, 96 F.3d at 438, 442.

Volusia County argues that the Service "clearly anticipated" takes resulting from artificial beachfront lighting in the incidental take permit, just as the issuing agency in *Ramsey* "clearly anticipated" takes resulting from salmon fishing regulations in the incidental take statement. 96 F.3d at 442. We are not convinced. As a threshold matter,

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> the Interior], after which the Service must provide the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat. . . . [I]f the Biological Opinion concludes that the agency action will not result in jeopardy or adverse habitat modification, or if it offers reasonable and prudent alternatives to avoid that consequence, the Service must provide the agency with a written statement (known as the "*Incidental Take Statement*") specifying the "impact of such incidental taking on the species," any "reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact," and setting forth "the terms and conditions . . . that must be complied with by the Federal agency . . . to implement [those measures]."

Bennett v. Spear, 117 S. Ct. 1154, 1159 (1997) (citations omitted and emphasis added).

the *Ramsey* court gave no indication that Oregon's and Washington's salmon fishing regulations served as purely mitigatory measures, as does Volusia County's artificial beachfront lighting activities.

In any event, the law governing incidental take statements issued under 16 U.S.C. § 1536(b), the statutory source in *Ramsey*, differs from the law governing incidental take permits issued under 16 U.S.C. § 1539(a), the statutory source in this case. *See generally Ramsey*, 96 F.3d at 439. First, the issuing agency's prerequisite findings are not the same. To permit an incidental taking under 16 U.S.C. § 1536(b), the issuing agency must conclude, in pertinent part, that:

> [1] the agency action will not [likely jeopardize the continued existence of any protected species or result in the destruction or adverse modification of its critical habitat ("likely jeopardize protected species")], or [the agency] offers reasonable and prudent alternatives which the Secretary believes would not [jeopardize protected species]; [and]
>
> [2] the taking of an endangered species or a threatened species incidental to the agency action will not [likely jeopardize protected species][.]

16 U.S.C. § 1536(b)(4) (incorporating by reference 16 U.S.C. § 1536(a)(2)).[13] To permit an incidental taking

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[13] Not relevant to this case, a third finding is required if "a marine mammal is involved." 16 U.S.C. § 1536(b)(4)(C) (incorporating by reference 16 U.S.C. § 1371(a)(5), a section of the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407).

under 16 U.S.C. § 1539(a), however, the issuing agency must find, in pertinent part, that:

> [1] the taking will be incidental;
>
> [2] the applicant will . . . minimize and mitigate the impacts of such taking;
>
> [3] the applicant will ensure that adequate funding for the [habitat conservation] plan will be provided;
>
> [4] the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
>
> [5] the [other measures that the issuing agency may require] will be met[.]

16 U.S.C. § 1539(a)(2)(B) (incorporating by reference 16 U.S.C. § 1539(a)(2)(A)(iv)). Both, of course, require a finding that the take sought to be authorized will be "incidental." Both also focus on the ultimate effect of the incidental take on the species. *See* 16 U.S.C. § 1539(a)(2)(B)(iv) ("the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild"); 50 C.F.R. § 402.02 (proposed action "jeopardizes" the species at issue if it can "reasonably . . . be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species"). Only 16 U.S.C. § 1539, however, expressly requires a finding of future mitigation.[14] As such, the holding of *Ramsey* – that

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[14] It is true the issuing agency must condition the incidental take statement on the implementation of quasi-mitigatory

a nonapplicant's actions can be excepted from take liability if they are contemplated in an incidental take statement – cannot fairly be read to apply to mitigatory measures contemplated in an incidental take permit. *See* 96 F.3d at 442.

A second important difference between an incidental take statement (16 U.S.C. § 1536(b)) and an incidental take permit (16 U.S.C. § 1539(a)) lies in the broad language of 16 U.S.C. § 1536(*o*), which applies only to holders or beneficiaries of the former. Under section 1536(*o*), "*any* taking that is in compliance with the terms and conditions specified in [an incidental take statement issued under 16 U.S.C. § 1536(b)] shall not be considered to be a prohibited taking of the species concerned." 16 U.S.C. § 1536(*o*)(2).[15] No similar provision applies to

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"reasonable and prudent measures" that the agency deems "necessary or appropriate to minimize" the impact of the incidental take on the species. 16 U.S.C. § 1536(b)(4)(ii); *e.g., Center for Marine Conservation v. Brown*, 917 F. Supp. 1128, 1148-49 (S.D.Tex.1996) (discussing "reasonable and prudent measures" to keep sea turtle mortalities from exceeding the levels established in an incidental take statement). This, however, is not the same as an express finding that "the applicant *will* . . . minimize and *mitigate* the impacts of" the incidental take. 16 U.S.C. § 1539(a)(2)(B)(ii) (emphasis added). The *Ramsey* court gave no indication that Oregon's and Washington's salmon regulations were "reasonable and prudent measures" upon which the issuing agency conditioned the incidental take statement.

[15] Construing this statutory language as broad, the *Ramsey* court extended incidental take statement protection to entities that were neither applicants nor federal agencies. *Ramsey*, 96 F.3d at 441 ("[Section 1536(*o*)(2)] indicates that any taking – whether by a federal agency, private applicant, or other party –

"any" taking in compliance with an incidental take permit's terms and conditions, including mitigatory measures. The closest analogous provision in section 1539 appears only in the converse: the issuing official "shall revoke [an incidental take permit] if he finds that the permittee is not complying with the terms and conditions of the permit." 16 U.S.C. § 1539(a)(2)(C).[16]

Finally, the prohibitions that underlie the incidental take exceptions are unique. The prohibition that underlies the incidental take statement exception applies only to federal agencies, and imposes upon them a duty to consult with the statement-issuing agency and ensure that their proposed action will not likely "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat[.]" 16 U.S.C. § 1536(a)(2) (the "jeopardy" clause). The prohibition that underlies the incidental take permit exception applies to federal, state, local and private actors, and creates no similar duty to

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that complies with the conditions set forth in the incidental take statement is permitted.").

[16] We are aware that the *Ramsey* court noted that "[i]f the private party complies with the requirements of the incidental take permit, *any* taking of a listed species will not violate [16 U.S.C. § 1538(a)(1)(B).]" 96 F.3d at 439 n.6 (emphasis added). The court, however, framed this unpersuasive dicta too broadly. No support for this notion can be drawn from the only authority that the *Ramsey* court cited, 16 U.S.C. § 1539(a)(1)(B). Wisely, Volusia County abandoned its previous reliance on this footnote. Even if this footnote somehow accurately reflected the law, we have found that any takes of sea turtles through artificial beachfront lighting do not "comply" with the terms and conditions of the Volusia County's incidental take permit.

consult. *See* 16 U.S.C. §§ 1532(13), 1538(a)(1)(B) (the "take" prohibition). Additionally, the "jeopardy" clause applies to protected fish, wildlife and plants, whereas the "take" prohibition applies only to protected fish and wildlife. *See* 16 U.S.C. §§ 1532(16), 1536(a)(2), 1538(a)(1). Consequently, some activities – especially those relating to land use – are more likely to result in "jeopardy" than a "take." *See Sweet Home*, 115 S. Ct. at 2415 ("Section 7 [16 U.S.C. § 1536] imposes a broad, affirmative duty to avoid adverse habitat modifications that § 9 [16 U.S.C. § 1539] does not replicate, and § 7 does not limit its admonition to habitat modification that actually kills or injures wildlife.") (internal quotation marks and citations omitted); Andrew J. Doyle, Note, *Sharing Home Sweet Home with Federally Protected Wildlife*, 25 Stetson L.Rev. 889, 911 n.174 (1996) ("[I]t is easier to 'jeopardize' than it is to 'harm.' "). These differences further militate against broadening the scope of the incidental take permit exception (16 U.S.C. § 1539(a)) even if some courts have suggested that section 1536(*o*) serves to broaden the scope of the incidental take statement exception (16 U.S.C. § 1536(b)). *See Ramsey*, 96 F.3d at 441 ("[A]ny taking . . . that complies with the conditions set forth in the incidental take statement is permitted."). *See generally Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1580 (9th Cir. 1993) ("Under [16 U.S.C. § 1536], . . . limited takings may be permitted if they are incorporated into the 'terms and conditions' of a Reasonable and Prudent Alternative drawn up in connection with the issuance of a Biological Opinion.").

The fact remains that no court has been presented with the issue facing us today. To be sure, protecting troubled wildlife is serious business. *See Tennessee Valley*

Auth. v. Hill, 437 U.S. 153, 174 (1978) ("[T]he language, history, and structure of the [Endangered Species Act] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."); *Strahan v. Linnon*, 967 F. Supp. 581, 618 (D. Mass. 1997) ("The Endangered Species Act is a powerful and substantially unequivocal statute."). Consequently, permits that purport to excuse takes of wildlife must be clear on their face. *See* 50 C.F.R. § 13.42 ("The authorizations on the face of a permit which . . . permit a specifically limited matter[ ] are to be strictly construed[.]"); *see also* 50 C.F.R. § 220.42. In this case, "the Secretary . . . permit[ted]" only takes of sea turtles incidental to driving on the beach. 16 U.S.C. § 1539(a)(1). Accordingly, the district court erred in dismissing the Turtles' claim that artificial beachfront lighting takes sea turtles.[17]

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[17] We agree with the district court that contrary to Volusia County's cursory contention, "the doctrine of primary jurisdiction is inapplicable to the present case." *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995) (citing *United States v. Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956)).

We also summarily reject Volusia County's argument that its mitigatory measures render moot any remedy that the Turtles could possibly seek, short of a total blackout on the beach. The effectiveness of these mitigatory measures – that the Turtles dispute with record evidence – is an issue that can be resolved only at trial.

Finally, Volusia County erroneously contends that the Turtles' appeal is an attempt to circumvent the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* Unlike the environmental group in *Friends*, the Turtles do not challenge the Service's issuance of the incidental take permit. *See* 760 F.2d at 981, 982. The Turtles assume the validity of the Service's permit decision

B.

"To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997) (citations omitted). The district court found that the Turtles failed to satisfy both the "fairly traceable" and "redressability" prongs of the standing doctrine to complain of the "harm" that artificial beachfront lighting causes them within the municipalities of Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach. Those municipalities – not parties to this case – each possess at least some degree of regulatory authority and enforcement control over public and private artificial beachfront lighting within their borders.

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in contending that Volusia County lacks the Service's permission to take sea turtles through artificial beachfront lighting. *See generally United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D.Mont.1988) ("[T]he court intends to instruct the jury that the government must prove three elements beyond a reasonable doubt in order for the defendant to be convicted: first, that the defendant knowingly took an animal within the United States; second, that the animal was a grizzly bear; and third, that the defendant did not have *permission* from the United States Department of the Interior to take the bear.") (emphasis added).

1.

"The fairly traceable element explores the causal connection between the challenged conduct and the alleged harm." *Federal Deposit Ins. Corp. v. Morley*, 867 F.2d 1381, 1388 (11th Cir.), *cert. denied*, 493 U.S. 819 (1989). Essentially, "this requirement focuses on whether the line of causation between the illegal conduct and injury is too attenuated." *Morley*, 867 F.2d at 1388 (internal quotation marks and citations omitted). The causal link may become "too attenuated" if the injury is "the result of the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and alterations omitted). On the other hand, standing is not defeated merely because the alleged injury can be fairly traced to the actions of both parties and non-parties. *See generally Lujan*, 504 U.S. at 560 (injury cannot be the result of "independent" third party action).

We are not asked to trace to Volusia County the Turtles' alleged "harm" in unincorporated beach communities like Wilbur-by-the-Sea, Ormond-by-the-Sea and Bethune Beach, as well as the incorporated Town of Ponce Inlet. Indisputably, Volusia County possesses exclusive local regulatory and enforcement control over artificial beachfront lighting in those locations. Instead, we are asked to review whether a "causal connection" exists between Volusia County's regulatory action and the Turtles' alleged "harm" within the municipalities of Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach. *Morley*, 867 F.2d at 1388. To answer this question, we examine Volusia County's charter and its artificial beachfront lighting ordinances.

Volusia County's charter requires it to protect the environment through county-wide ordinance:

> The council . . . shall establish minimum standards . . . for the protection of the environment. . . . by ordinance. Such standards . . . shall apply within all the incorporated and unincorporated areas of Volusia County. In the event of a conflict between any standard . . . established by a County ordinance, the County ordinance shall prevail within the municipality to the extent of any conflict; provided, however, the governing body of each municipality may establish more restrictive standards . . . within the municipality for the protection of the environment.

Volusia County, Fla., Home Rule Charter, Art. II, § 202.4 (1989); *see generally City of Ormond Beach v. County of Volusia*, 535 So.2d 302, 303 & n.3 (Fla. 5th D.C.A. 1988) (discussing "charter counties such as Volusia" and noting that "[t]he charter provides that the county's ordinances prevail if it sets minimal standards protecting the environment by prohibiting or regulating air or water pollution or the destruction of the resources of the county belonging to the general public") (internal quotation marks omitted).[18]

To this aim, in December 1989, Volusia County enacted Ordinance 89-60, entitled "Minimum Environmental Standards for Sea Turtle Protection." Volusia County, Fla., Ordinance No. 89-60, § 2 (1989). Seeking generally to "minimiz[e] the artificial light on the

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[18] Volusia County's charter became effective January 1, 1971.

beaches[,]" the ordinance classifies its restrictions into three categories: (1) lights associated with new development; (2) lights associated with existing development; and (3) lights that are publicly owned. Volusia County, Fla., Ordinance No. 89-60, § 2 (amending Ordinance No. 88-15, Art. VI, §§ 601, 603, 604, 606 (1988)). The substance of these restrictions does not concern us today.[19] What is important, however, is where the restrictions apply. The ordinance's restrictions on new development apply county-wide, unless a municipality timely submits a proposed ordinance of its own that the county council determines to be in compliance with Ordinance 89-60's minimum standards. Volusia County, Fla., Ordinance No. 89-60, § 2 (amending Ordinance No. 88-15, Art. VI, §§ 603, 609). All the municipalities at issue (Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach) have elected to either enact and enforce a complying ordinance of their own as to new development or submit to Volusia County's enforcement of Ordinance 89-60 within their borders.

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[19] The record reveals that Volusia County later repealed Ordinance 89-60 and immediately readopted, with some "turtle-friendlier" changes, the "Minimum Environmental Standards for Sea Turtle Protection." *See* Volusia County, Fla., Ordinance Nos. 95-10, 95-18 (1995). According to the Turtles' brief, Volusia County further amended those minimum standards in an ordinance dated August 25, 1995. *See* Volusia County, Fla., Ordinance No. 95-30. For simplicity's sake, we will refer to the current version of the Minimum Environmental Standards for Sea Turtle Protection as "Ordinance 89-60, as amended."

The majority of allegedly "harmful" lighting, however, stems from existing development and public lighting. The Minimum Environmental Standards for Sea Turtle Protection pertaining to existing development and public lighting do not apply *at all* to Daytona Beach and Daytona Beach Shores. *See* Volusia County, Fla., Ordinance No. 89-60, § 2 (amending Ordinance No. 88-15, Art. VI, §§ 602, 604, 606). Those two municipalities' beaches, according to Volusia County's ordinance, are not "utilized or likely to be utilized[ ] by sea turtles for nesting[.]" Volusia County, Fla., Ordinance No. 89-60, § 2 (amending Ordinance No. 88-15, Art. VI, § 602). According to the Turtles' complaint and the incidental take permit, neither municipality has enacted any lighting restrictions.

As to other incorporated areas of Volusia County, the Minimum Environmental Standards for Sea Turtle Protection pertaining to existing development and public lighting apply unless a municipality submits a proposed ordinance of its own that the county council determines to be in compliance with Ordinance 89-60's minimum standards. *See* Volusia County, Fla., Ordinance No. 89-60, § 2 (amending Ordinance No. 88-15, Art. VI, §§ 604, 606, 609). Ormond Beach and New Smyrna Beach are two municipalities that enforce their own county-approved version of Ordinance 89-60, as amended.

Volusia County later enacted its own artificial beachfront lighting ordinance that exceeded the minimum standards established in Ordinance 89-60, as amended. *See* Volusia County, Fla., Ordinance No. 90-22, § 3 (1990) (amending Ordinance No. 88-3, Art. XII, §§ 1201-1206).

Ordinance 90-22 applies to unincorporated beach communities of Volusia County like Wilbur-by-the-Sea, Ormond-by-the-Sea and Bethune Beach, as well as the incorporated Town of Ponce Inlet. Exempted from Ordinance 90-22 are Daytona Beach, Daytona Beach Shores and "any incorporated areas of Volusia County which have adopted the . . . Minimum Environmental Standards for Sea Turtle Protection[,]" such as Ormond Beach and New Smyrna Beach. Volusia County, Fla., Ordinance No. 90-22, § 3 (amending Ordinance No. 88-3, Art. XII, § 1202). In comparison with Ordinance 89-60, as amended, Ordinance 90-22 appears "turtle-friendlier." For example, Ordinance 90-22 requires most lights to be turned off at sunset rather than 8:30 p.m. during the nesting season. *Compare* Volusia County, Fla., Ordinance No. 90-22, § 3 (amending Ordinance No. 88-3, Art. XII, §§ 1203-1205) *with* Volusia County, Fla., Ordinance No. 95-18, §§ 4-6.

The Turtles' theory of causation is twofold. First, they contend that Volusia County's exempting Daytona Beach and Daytona Beach Shores from all lighting restrictions, including the Minimum Environmental Standards for Sea Turtle Protection in Ordinance 89-60, as amended, serves as a cause-in-fact of their "harm" in those two municipalities. Similarly, they contend that Ordinance 89-60, as amended, and Ordinance 90-22 are causally connected to their "harm" in Ormond Beach and New Smyrna Beach since they allow those municipalities to retain only the allegedly deficient Minimum Environmental Standards for Sea Turtle Protection. The second – and presently unchallenged – prong of the Turtles' theory of causation builds on their first, positing that even if Ordinance 90-22

applied county-wide, its restrictions are too lax to prevent takes. Mentioning only Daytona Beach and Daytona Beach Shores, Volusia County responds that it cannot be liable for takes in those locations because it "had no authority to regulate lighting within those municipalities" and "in no way authorized any activity by either of those municipalities that could have resulted in harm to the turtles."[20]

We agree with the Turtles that they have shown a sufficient causal connection to seek to hold Volusia County liable for "harmfully" inadequate regulation of artificial beachfront lighting in the non-party municipalities of Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach. First, Volusia County possesses primary authority to regulate artificial beachfront lighting county-wide. The county charter expressly grants Volusia County the authority – and arguably a duty – to "establish minimum standards . . . for the protection of the environment. . . . by ordinance" that "apply within all the incorporated and unincorporated areas of Volusia County." Volusia County, Fla., Home Rule Charter, Art. II, § 202.4. Volusia County did just that. It mandated a floor of, that is, minimum, lighting standards that Ormond Beach and New Smyrna Beach must implement and enforce. Similarly, based on an ordained finding (in both Ordinance 89-60, as amended, and Ordinance 90-22) that sea turtles do not nest or likely nest in Daytona Beach and Daytona Beach

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[20] Volusia County's brief does not specifically mention Ormond Beach or New Smyrna Beach.

Shores, Volusia County decided that no lighting restrictions should apply to them.[21] *See* Volusia County, Fla., Ordinance No. 89-60, § 2 (Daytona Beach and Daytona Beach Shores are not "utilized or likely to be utilized[ ] by sea turtles for nesting") (amending Ordinance No. 88-15, Art. VI, § 602). That Ormond Beach and New Smyrna Beach have the supplemental authority to enact more onerous, and Daytona Beach and Daytona Beach Shores could decide to enact some, lighting standards do not sever the "fairly traceable" connection between Volusia County's regulatory actions and the Turtles' alleged "harm."

The only truly "independent action[s]" are Ormond Beach's and New Smyra [sic] Beach's enforcement of the Minimum Environmental Standards for Sea Turtle Protection.[22] *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). In contrast to its charter-based

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[21] The Turtles argue that exempting Daytona Beach and Daytona Beach Shores from the Minimum Environmental Standards for Sea Turtle Protection violates the county charter. We will not consider this argument because it "was not presented to the district court and on appeal is raised for the first time in the reply brief." *United States v. Campo*, 793 F.2d 1251, 1252 (11th Cir.), *cert. denied*, 479 U.S. 938 (1986). We therefore treat as uncontested the district court's conclusion that Volusia County's enaction of the ordinances at issue was valid under its charter and state law.

[22] The same holds true for Daytona Beach's and Daytona Beach Shores' enforcement of the Minimum Environmental Standards for Sea Turtle Protection pertaining to new development.

authority to set minimum standards for artificial beachfront lighting, Volusia County does not possess any control over the actual, day-to-day enforcement measures that Ormond Beach and New Smyrna Beach employ. Ordinance 89-60, as amended, states that Ormond Beach and New Smyrna Beach

> shall . . . submit to the county council[ ] [their] ordinance[s] containing the *standards* in [the Minimum Environmental Standards for Sea Turtle Protection]; provided, however, . . . [Ormond Beach and New Smyrna Beach] may elect to authorize the county to *administer* [the Minimum Environmental Standards for Sea Turtle Protection] within [their borders]. . . . If such ordinance[s] . . . [are] not in compliance with [the Minimum Environmental Standards for Sea Turtle Protection], then, . . . the county council may *enforce* [the Minimum Environmental Standards for Sea Turtle Protection] in [Ormond Beach and New Smyrna Beach].

Volusia County, Fla., Ordinance No. 95-18, § 3 (emphasis added). Therefore, the Turtles lack standing to seek to hold Volusia County responsible for inadequate enforcement efforts on the part of Ormond Beach and New Smyrna Beach.

This absence of *enforcement* control on Volusia County's part, however, does not defeat the Turtles' standing to sue for inadequate *regulation*, the Turtles' core theory of causation in those two municipalities. At trial, the district court can simply assume full and complete enforcement efforts on the part of Ormond Beach and New Smyrna Beach. This assumption will focus the trier of fact solely on the regulatory acts of Volusia County in

determining whether the Minimum Environmental Standards for Sea Turtle Protection as contained within Ordinance 89-60, as amended, cause "harm" (*e.g.*, insufficient on their face to prevent "harm") to sea turtles in Ormond Beach and New Smyrna Beach. *See generally Lujan*, 504 U.S. at 561 (the existence of standing "must be supported adequately by the evidence adduced at trial") (internal quotation marks and citations omitted). As a defense, of course, Volusia County may show that its Minimum Environmental Standards for Sea Turtle Protection as contained within Ordinance 89-60, as amended, if fully enforced, would prevent "harm" to the Turtles.

The trier of fact need not make any similar assumption with regard to Daytona Beach and Daytona Beach Shores. In exempting altogether those two municipalities from even the Minimum Environmental Standards for Sea Turtle Protection as contained within Ordinance 89-60, as amended, Volusia County obviously contemplated that they will not employ any enforcement measures. Furthermore, according to the complaint and the incidental take permit, nothing exists in those two municipalities to enforce. At trial, the trier of fact's inquiry can simply be whether the lack of artificial beachfront lighting restrictions in Daytona Beach and Daytona Beach Shores causes "harm" to sea turtles in those locations. As a defense, Volusia County may seek to prove the converse (*e.g.*, protected sea turtles do not nest or shelter in those locations and/or unrestricted lighting does not "harm" them).

Because the district court dismissed the Turtles' claims of takes in Daytona Beach, Daytona Beach Shores,

Ormond Beach and New Smyrna Beach for lack of *standing*, we need not decide whether the Turtles have made a sufficient showing of causation for purposes of *liability*. Nonetheless, precedent from the Supreme Court and other circuits that address causation for purposes of liability support our holding. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Supreme Court stated that the ESA's "harm" regulation "encompasses *indirect* as well as direct injuries[.]" 115 S. Ct. at 2413 (emphasis added). Thus, under *Sweet Home*, Volusia County need not operate every beachfront lighting source itself to be held liable under the ESA. Rather, its indirect control over lighting is sufficient – at the very least – for purposes of standing.[23]

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[23] In *Sweet Home*, the Supreme Court suggested that the ESA's "take" prohibition and the "harm" regulation "incorporate ordinary requirements of proximate causation and foreseeability." 115 S.Ct. at 2412 n.9. Strangely, the Turtles ask us to apply *Sweet Home*'s "proximate causation" excerpt to the "fairly traceable" prong of standing. We decline to do so. First, no authority even remotely suggests that proximate causation applies to the doctrine of standing. Second, this portion of *Sweet Home* is likely dicta since the only dispute in that case was a facial one, whether the Secretary of the Interior "reasonably construed the intent of Congress" in promulgating the "harm" regulation. 115 S. Ct. at 2418; *cf.* Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1065 (9th Cir. 1996) ("The case involved a facial challenge to the Secretary's definition of 'harm.' To the extent the *Sweet Home* opinion may be read to say past injury is required before an injunction may issue, such statement is dictum."), *cert. denied*, 117 S. Ct. 942 (1997). *See generally* Andrew J. Doyle, Note, Sharing Home *Sweet Home* with Federally Protected Wildlife, 25 Stetson L.Rev. 889, 900-901, 920-924 (1996) (discussing the virtual absence of published case law explicitly applying the doctrines of proximate cause and foreseeability to

At least two circuits, the First and the Eighth, have held that the regulatory acts of governmental entities can cause takes of protected wildlife. *See Strahan v. Coxe*, 127 F.3d 155, 158, 163 (1st Cir. 1997) (state agency caused takings of the endangered right whale because it "licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in violation of [the ESA]"), *petition for cert. filed*, 66 U.S.L.W. 3605 (Mar. 6, 1998) (No. 97-1485); *Defenders of Wildlife v. Administrator, Envtl. Protection Agency*, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (federal agency caused takes of the endangered black-footed ferret through its "decision to register pesticides" even though other persons actually distributed or used the pesticides). In *Defenders of Wildlife*, federal law prohibited farmers from using strychnine, a pesticide, unless the Environmental Protection Agency (EPA) registered it. 882 F.2d at 1296. Although intended to kill non-endangered rodents such

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the ESA's "take" prohibition or "harm" regulation, and recommending that courts treat *Sweet Home* merely "as a statutory construction case that upheld the validity of an agency's regulation" and look to other "take" and "harm" case law such as *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), where the plaintiff established causation through "proof that a [state agency's] sheep ate certain immature vegetation on which the endangered palila totally relied in its mature state[,]" to frame the element of causation). Even if the concept of proximate causation somehow governed our analysis, we note that it would not necessarily produce a result different from that of cause-in-fact. *See generally* Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1399 (11th Cir. 1994) ("A proximate cause is not . . . the same thing as a sole cause."), *cert. denied*, 513 U.S. 1110 (1995).

as prairie dogs, strychnine was also killing endangered black-footed ferrets. 882 F.2d at 1297. Environmental groups sued the EPA, alleging that its "continued registration of strychnine resulted in poisonings of protected species under the ESA[.]" 882 F.2d at 1298. The Eighth Circuit affirmed the district court's finding that the EPA violated the "take" prohibition, the only ESA violation in dispute. 882 F.2d at 1300, 1303. The court held that "the continued registration of a pesticide, as distinguished from the distribution or use of that pesticide, can constitute an illegal taking under the ESA." 882 F.2d at 1300. As to causation, the court found a "clear" relationship between the EPA's regulatory action – the registration of strychnine – and ferret deaths. 882 F.2d at 1301.

This case, like *Defenders of Wildlife*, involves a regulatory entity that exerts control over the use of something that allegedly takes protected wildlife. In both cases, the regulatory entity purports to make lawful an activity that allegedly violates the ESA. In *Defenders of Wildlife*, the EPA registered strychnine, allowing farmers to use it. In this case, Volusia County ordained beachfront lighting, allowing landowners to use lights all day and all night (that is, in Daytona Beach and Daytona Beach Shores) or use lights only during daylight hours and turn them off at sunset (that is, in unincorporated areas and the Town of Ponce Inlet) or 8:30 p.m. (that is, in Ormond Beach and New Smyrna Beach).

Volusia County's attempt to distinguish materially *Defenders of Wildlife* is unpersuasive. Volusia County contends that, unlike the EPA, it is not directly responsible for protecting endangered species. Volusia County, however, is subject to the ESA's "take" prohibition in the

exact same manner as the EPA. *See* 16 U.S.C. § 1532(13) ("person[s]" subject to the "take" prohibition include "any . . . agent . . . of the Federal Government" and "any . . . political subdivision of a State"); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("All persons, including federal agencies, are specifically instructed not to 'take' endangered species[.]"); *see also Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997). Furthermore, contrary to Volusia County's and the district court's view, that the EPA had a separate and distinct duty under the ESA to ensure that its decision would not likely jeopardize endangered species did not factor into the *Defenders of Wildlife* court's holding. *See* 16 U.S.C. § 1536(a)(2) (the "jeopardy" clause); *Tennessee Valley*, 437 U.S. at 184, 193 (holding that a federal entity's operation of a dam violated the "jeopardy" clause, and separately noting that "[w]e do not understand how [the federal entity] intends to operate [the dam] without 'harming' the snail darter[,]" a threatened fish). The parties in *Defenders of Wildlife* disputed the EPA's liability only under the "take" prohibition, not the "jeopardy" clause. *See* 882 F.2d at 1300, 1303. Volusia County also purports to differentiate the specificity of the EPA's regulatory action in relation to its own. In *Defenders of Wildlife*, the court affirmed a trial finding of liability. In this case, we reverse a pretrial finding of no standing. Thus, Volusia County's argument concerns not the "irreducible constitutional minimum of standing" but raises "questions of proximity and degree" that are best saved for trial. *Bennett*, 117 S. Ct. at 1161

(internal quotation marks omitted); *Sweet Home*, 115 S. Ct. at 2418.[24]

Even more persuasive than the Eighth Circuit's opinion in *Defenders of Wildlife* is the First Circuit's opinion in *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). In *Strahan*, Massachusetts law prohibited fishing companies from using gillnet and lobster pot fishing equipment without a license. A state agency "vested with broad authority to regulate fishing" issued the licenses and, through regulation, restricted the use of the fishing equipment only in certain areas. 127 F.3d at 159. According to reports from the National Marine Fisheries Service, "entanglement with fishing gear is one of the leading causes of the depletion of the [endangered] Northern Right whale population[.]" 127 F.3d at 159.

A conservationist sued the state agency under the ESA, alleging that its continued licensing of fishing equipment caused "harm" to the right whale. *See* 127 F.3d at 158. The district court granted preliminary injunctive relief. First, as a threshold matter, the district court concluded that the conservationist had standing to sue the state agency even though "[i]ndisputably, the actions of third parties not before the court – commercial fishing . . . operations – are the immediate cause of the harm to endangered whales[.]" *Strahan v. Coxe*, 939 F. Supp. 963, 978 (D. Mass. 1996), *aff'd in part, vacated in part on other grounds*, 127 F.3d 155 (1st Cir. 1997). The district

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[24] Again, we leave it to the district court to decide the standard for causation for purposes of liability. We have framed the causation inquiry only to sever out the independent actions of non-parties that we cannot fairly trace to Volusia County.

court found a sufficient causal connection between the alleged "harm" to whales and the agency's licensing of fishing equipment, pointing to the fact that "[f]ishing vessels *cannot*, legally, place gillnets and lobster gear in Massachusetts waters without permission from [the agency]." 939 F. Supp. at 978. Reaching the merits of the ESA taking claim, the district court found that the agency's "commercial fishing *regulatory scheme* likely exacted a taking in violation of the ESA." 127 F.3d at 163 (emphasis added). Concerning causation as one of the essential elements of the "take" prohibition, the district court found it "irrelevant that [the agency's] permitting of commercial fishing gear is only an indirect cause of whale entanglement[.]" 939 F. Supp. at 985.

On appeal, the First Circuit affirmed the judgment of the district court with respect to its ESA holdings. *See* 127 F.3d at 158.[25] First, the court held that "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA." 127 F.3d at 163. Second, the court affirmed the district court's finding of causation, stating that "while indirect, [the harm] is not so removed [from the agency's regulatory action] that it extends outside the realm of causation as it is understood in the common law." 127 F.3d at 164. Finally, the court rejected the agency's analogy that its fishing equipment licensure "does not cause the taking any more than [the state's] licensure of automobiles and drivers solicits or causes federal crimes, even though automobiles it

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[25] The First Circuit did not specifically address the district court's determination of standing.

licenses are surely used to violate federal drug laws, rob federally insured banks, or cross state lines for the purpose of violating state and federal laws." 127 F.3d at 164. The court reasoned that, unlike the licensing of automobiles, the licensing of fishing equipment "does not involve the intervening independent actor [as] a necessary component" because "it is not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in a manner permitted by the [state agency] without risk of violating the ESA by exacting a taking." 127 F.3d at 164.

Like the state agency in *Strahan*, Volusia County is alleged to be a "governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species[.]" *Strahan*, 127 F.3d at 163. Just as the *Strahan* agency was "vested with broad authority to regulate fishing" under state law, Volusia County is "vested with broad authority to regulate" artificial beachfront lighting under its charter and ordinances. 127 F.3d at 159. Volusia County would have us hold that Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach are "intervening independent actor[s]" in the regulation of artificial beachfront lighting. 127 F.3d at 164. It is true that, as we concluded earlier, Ormond Beach and New Smyrna Beach independently enforce their county-approved lighting ordinances. In all other respects, however, no "intervening independent actor" exists concerning lighting standards and enforcement in Volusia County. As Volusia County concedes, it possesses sufficient regulatory and enforcement control over artificial beachfront lighting in all unincorporated areas and the Town of Ponce Inlet. But for Volusia County's regulatory

determination that Daytona Beach and Daytona Beach Shores fall outside the sea turtle nesting areas, light users in those locations would be subject to at least the Minimum Environmental Standards for Sea Turtle Protection as contained within Ordinance 89-60, as amended. Just as it was impossible in *Strahan* "for a licensed commercial fishing operation to use its gillnets or lobster pots in a manner permitted by the [agency] without risk of violating the ESA[,]" a genuine issue of fact exists in this case that the lighting activities of landowners along Volusia County's beaches – as authorized through local ordinance – violate the ESA. 127 F.3d at 164. Accordingly, at the very least, the Turtles, analogous to the conservationist in *Strahan*, have standing to proceed against Volusia County for lighting-related "harm" in Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach – even though the actions or inactions of those "third parties not before the court" may be another "cause of the harm[.]" 939 F. Supp. at 978.

2.

The "redressability" prong of the standing doctrine asks whether it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks and citations omitted). The Turtles' complaint prays for the district court to: (1) declare that Volusia County's "refusal to eliminate those artificial beachfront light sources that . . . misorient sea turtles from May 1st through October 31st annually constitutes an unlawful 'taking' of the loggerhead and green [sea] turtle"; and (2) enjoin permanently Volusia County "from permitting

those artificial light sources that misorient sea turtles[.]" Given the Turtles' record evidence, we easily conclude that if the district court were to grant the requested relief, fewer protected sea turtles would be "harmed" through misorientation. *Cf. Strahan*, 939 F. Supp. at 979 ("If the [state agency] were to limit further[ ] or ban . . . the use of gillnets and lobster gear in Massachusetts waters, it is likely that fewer endangered whales would be harmed through entanglements.").

Although "redressability – like the other prongs of the standing inquiry – does not depend on the defendant's status as a governmental entity[,]" unique constitutional implications exist whenever a federal district court is asked to order a state entity to take regulatory action. *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1017 n.5 (1998). Volusia County argues that granting the requested relief, that is, enjoining it from permitting "harmful" lighting, would be tantamount to ordering it to legislate in violation of the separation of powers.[26] As the Turtles correctly point out, however, we need not find constitutional every conceivable remedy within the "full scope of traditional equitable injunctive powers" available to the district court. *Strahan*, 127 F.3d at 170. Rather, we need only find constitutional at least one available remedy that would adequately bring about Volusia County's compliance with the ESA. *See Strahan*, 127 F.3d at 171 ("The district court was not required to go any farther than ensuring that any violation would end.").

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[26] Unlike the defendants in *Strahan*, Volusia County does not assert Tenth or Eleventh Amendment immunity. *See* 127 F.3d at 166-71. Nor does Volusia County raise federalism concerns.

Assuming, without deciding, that ordering Volusia County to implement and enforce county-wide a "turtle-friendlier" ordinance would violate the separation of powers, we find that alternative effective relief exists. The injunctive relief awarded in *Defenders of Wildlife* and *Strahan* is instructive. In *Defenders of Wildlife*, the district court "basically enjoined the EPA from continuing its registration of strychnine until the EPA could do so without illegally taking protected species of wildlife." 882 F.2d at 1298; *see also National Wildlife Fed'n v. Hodel*, No. S-85-0837 EJG, 23 Env't Rep. Cas. (BNA) 1089 (E.D. Cal. Aug. 26, 1985) (ordering the Secretary of the Interior and the Director of the Service to ban lead-shot bird hunting in portions of California, Illinois, Missouri, Oklahoma and Oregon based on a finding that their continued authorization caused takes of threatened bald eagles that ate lead-infested prey). In *Strahan*, the district court ordered the state agency to: (1) apply for an incidental take permit; (2) submit to the court a proposal "to restrict, modify or eliminate the use of fixed-fishing gear" in the endangered right whale's habitat; and (3) convene a committee that includes the plaintiff and other interested parties "to engage in substantive discussions . . . regarding modifications of fixed-fishing gear and other measures to minimize actual harm to the Northern Right whales[.]" 127 F.3d at 158; 939 F. Supp. at 992.

Like the district courts in *Defenders of Wildlife* and *Strahan*, the district court in this case has available a wide range of effective injunctive relief. Neither the appellate court in *Defenders of Wildlife* nor the appellate court in *Strahan* found any of that relief unconstitutional. Nor does that relief serve as an exhaustive list. For example,

in this case, the district court could strike Volusia County's ordained exemption of Daytona Beach and Daytona Beach Shores from the Minimum Environmental Standards for Sea Turtle Protection as contained within Ordinance 89-60, as amended. *Cf. Hershey v. City of Clearwater*, 834 F.2d 937, 939 (11th Cir. 1987) ("The law permits us to strike the words 'or sleep,' if unconstitutional, from the ordinance."). Similarly, the district court could declare that those minimum standards, even if fully enforced, fail to prevent "harm" to protected sea turtles in Ormond Beach and New Smyrna Beach and – like the district court in *Strahan* – order Volusia County to form a committee and propose a solution. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (concluding that Massachusett's alleged injury, losing a seat in the House of Representatives, was "likely to be redressed by declaratory relief against the Secretary [of Commerce] alone" even though the Secretary "cannot herself change the reapportionment") (plurality); *Strahan*, 127 F.3d at 158; 939 F. Supp. at 992.[27] Finding no binding or persuasive authority to the contrary, we hold that the Turtles' alleged "harm" in Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach can be constitutionally redressed through relief that respects the scope of Volusia County's regulatory control over those municipalities.

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[27] Those are just examples. We leave it to the district court to fashion appropriate injunctive relief if it finds Volusia County liable for sea turtle "harm" in any of the municipalities at issue.

C.

Where, as here, a responsive pleading to the original complaint has been filed, "a party may amend the party's pleading only by leave of court . . . and leave shall be freely given when *justice so requires*." Fed. R. Civ. P. 15(a) (emphasis added). Similarly, "[p]arties may be . . . added by order of the court on motion of any party . . . at any stage of the action and on such terms as are *just*." Fed. R. Civ. P. 21. (emphasis added). Technically, the Turtles sought leave to add a party, the leatherback sea turtle. *See, e.g., American Bald Eagle v. Bhatti*, 9 F.3d 163, 164 (1st Cir. 1993) (stating that the threatened bald eagle "brought this action to enjoin [a] . . . deer hunt"); *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106, 1107 (9th Cir. 1988) (stating that the endangered palila "has legal status and wings its way into federal court as a plaintiff in its own right").[28] In substance, however, the Turtles sought to allege additional takes. In any event, given the posture of this case, we agree with the district court that the standard for deciding the Turtles' motion for leave to file an amended complaint was the same under either rule 15(a) or 21. *Accord Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998) (discussing rule 15(a)'s applicability to plaintiff's motion to amend the complaint to add a second defendant outside the scheduling order's prescribed time period). As such,

> [i]n the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated

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[28] The Service added the leatherback sea turtle to the endangered species list in June 1970. 50 C.F.R. § 17.11(h).

> failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

We conclude that the district court's "apparent or declared reason" for denying leave to the Turtles failed to serve the interest of justice. First, the district court erroneously concluded that the Turtles failed to invoke subject matter jurisdiction. The factual premise to the conclusion – that a copy of their notice of intent to sue letter was not "on file with the Court" – was false. The record contains at least two copies of the letter.

Volusia County argues that, even if the district court had found the letter in the record, it insufficiently provided "notice of the violation" to the Secretary of the Interior and Volusia County. 16 U.S.C. § 1540(g)(2)(A)(i). We disagree. In its first paragraph, the letter expresses the need for "immediate action . . . to eliminate . . . artificial beachfront lighting sources that take *protected sea turtles* during turtle nesting season (May 1st through October 31st)[.]" (Emphasis added.) In the next paragraph, the letter explicitly references the leatherback sea turtle as one of three species of sea turtles that nest on Volusia County beaches. Contrary to Volusia County's interpretation, the letter's "violations" section is not facially inconsistent with the letter's general prayer in the first paragraph. That section avers that, as of March 23, 1995, the individual appellants possessed evidence of "*at least* 33 independent violations of the ESA" that involve

"the 'take' of loggerhead and green sea turtles[.]" (Emphasis added). When read in context, the exclusive reference to the loggerhead and green sea turtles in the violations section of the letter does not exclude the possibility of "continuing, forceable violations of the ESA" involving the leatherback sea turtle. Notice of Intent to Sue at 7. Thus, although the leatherback sea turtle "was referenced in only one part of the letter, the letter as a whole provided notice sufficient to afford the opportunity to rectify the asserted ESA violations." *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996).[29]

The second basis of the district court's order, the Turtles' undue delay, is equally flawed. One of the two exhibits attached to the Turtles' motion for leave to amend is dated "June 1995." The Turtles filed their original complaint and motion for preliminary injunction on June 8, 1995. We have no reason to doubt the Turtles' lawyer's representation that they did not obtain this publication until after the filing of their original complaint.

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[29] Volusia County obviously knew of its potential problems with the leatherback sea turtle since it included that reptile and other species in its application for an incidental take permit. *See* Notice of Receipt of an Application for an Incidental Take Permit, 61 Fed. Reg. 9716 (March 11, 1996) (summarizing Volusia County's application for an incidental take permit that "would authorize the take of five species of sea turtles (loggerhead sea turtle, . . . green sea turtle, . . . *leatherback sea turtle*, . . . hawksbill sea turtle, . . . and Kemp's ridley sea turtle . . .) and piping plovers . . . resulting from public beach-driving activity and lighting controlled and operated by Volusia County, to the extent that minimization and mitigation measures proposed in the habitat conservation plan . . . are not successful") (scientific names omitted and emphasis added).

Thus, this is not a case where the facts supporting the proposed amendment "were known at the time of the original [pleading]." *National Serv. Indus. v. Vafla Corp.*, 694 F.2d 246, 249 (11th Cir. 1982); *cf. Palila*, 852 F.2d at 1107 (noting the six-year gap between the original complaint and the amended complaint to add allegations of a new source of "harm" that "had not been the target of the original complaint because research . . . had not been completed"). Nonetheless, Volusia County insists that the Turtles must have known of the existence of leatherback sea turtles in March 1995, the date of their intent to sue letter. The district court, however, relied on no such factor. Additionally, the Turtles' failure to plead in their original complaint the existence of the leatherback sea turtle on Volusia County's beaches reconciles with their obligations under the federal rules and general notions of fair dealing. Allegations in a complaint must have "evidentiary support" to the best of the party's "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances." Fed. R. Civ. P. 11(b)(3) (filing a pleading warrants, among other things, that its "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery"); *Business Guides, Inc. v. Chromatic Communications Enterprises*, 498 U.S. 533, 541 (1991) ("A party who signs a pleading or other paper without first conducting a reasonable inquiry shall be sanctioned."). Assuming the author acts in good faith, an investigation preceding an intent to sue letter need not be as thorough as that leading up to the complaint. *See* Fed. R. Civ. P. 11(b) ("evidentiary support" and "reasonable

inquiry" requirements apply only to papers "present[ed] to the court"); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 40, 46 (1991) (affirming the sanctioning of pre-litigation conduct – commencing from "the time that plaintiff gave notice of its intention to file suit" – based on the court's "inherent power to impose sanctions for . . . *bad-faith* conduct") (emphasis added).

We recognize that in late July 1995 the Turtles submitted, in support of their motion for preliminary injunction, the very same exhibit that it relied upon as factual support for their proposed amended complaint. It is undisputed, however, that the Turtles, in contrast to the plaintiff in *Sosa*, filed their motion for leave to amend within the time period prescribed in the district court's scheduling order. *See* 133 F.3d at 1419. At most, their failure to request leave to file an amended complaint in late July instead of October supports a finding of "delay," not "*undue* delay" or "dilatory" action. *Foman*, 371 U.S. at 182 (emphasis added). Nothing in the record suggests that this gap was anything other than "[t]he mere passage of time." *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1490 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991).

The district court's final basis for denying leave, prejudice to Volusia County, constituted anything but "a substantial reason . . . to deny leave to amend[.]" *Florida Power & Light Co. v. Allis Chalmers Corp.*, 85 F.3d 1514, 1520 (11th Cir. 1996) (internal quotation marks and citations omitted). The district court reasoned that "[t]he impact of adding the leatherback [sea] turtle as a party, with its earlier breeding season, would be to foreclose the County's opportunity to litigate whether takes of sea turtles occurred during the period from February to

April, since the Court would be asked to preliminarily enjoin the County from allowing driving on the beach from February to October."[30] As the Turtles correctly point out, however, they did not ask for preliminary injunctive relief as to the leatherback sea turtle. Even if they would have requested such relief in the same or separate motion, the district court could have easily severed the issue of whether to grant preliminary injunctive relief from the issue of whether to grant leave to amend the complaint.[31]

The only purported prejudice we are left with is Volusia County's fear of incurring "additional expense and possible delay." Any amendment to an original pleading necessarily involves *some* additional expense to the opposing party. In this case, it is of nominal proportions. In accordance with the district court's scheduling order, discovery proceeded on the assumption that the leatherback sea turtle would be added as a party. *Cf. Hargett v. Valley Fed. Sav. Bank*, 60 F.3d 754, 761 (11th Cir. 1995) (affirming the denial of plaintiff's motion for leave to amend "which was filed more than eight months after the pretrial order was entered and almost ten months after [a discovery] deposition"). As to possible delay,

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[30] According to the proposed amended complaint, leatherback sea turtles nest and hatch from February 1 until October 31 annually, whereas loggerhead and green sea turtles nest and hatch from May 1 until October 31 annually.

[31] Additionally, as a practical consideration, this basis for denial of leave is now moot because the district court dissolved the preliminary injunction and the incidental take permit authorizes takes of leatherback sea turtles through beach driving, even those occurring before May 1.

Volusia County could not plausibly convince us that it genuinely wanted to go to trial as quickly as possible. On the contrary, it employed extraordinary efforts to obtain continuance orders. Volusia County representatives even met personally with the Secretary of the Interior to ensure the imminence of the Service's incidental take permit decision.

We are mindful that "[t]he decision whether to grant leave to amend is within the sound discretion of the trial court." *Jameson v. Arrow Co.*, 75 F.3d 1528, 1534 (11th Cir. 1996) (affirming the denial of leave to amend to a plaintiff who requested it "ten months after she retained counsel, discovery was closed, the complaint had been amended twice, and [the defendant] had filed two motions for summary judgment"). Reversal is inherently rare. Based on the circumstances of this case, however, we hold that the district court's denial of leave to amend the original complaint fell outside the permissible range of discretion. Accordingly, the interest of "justice so requires" that the leatherback sea turtle be included in further proceedings on remand. Fed. R. Civ. P. 15(a).[32]

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[32] The Turtles allude to the fact that their amended complaint also sought to include washed-back sea turtles (hatchlings that initially reach the ocean but the surf subsequently washes ashore) as victims of beach driving. Of course, adding washed-back turtles to their claim at this juncture would be moot in light of the incidental take permit that expressly covers such takes. The same is true of leatherback sea turtles and beach driving. The incidental take permit expressly excepts incidental takes of leatherback sea turtles through beach driving, including incidental takes occurring prior to May 1 of each year. Finally, unlike the district court, we do not construe the Turtles' proposed amended complaint as

V. CONCLUSION

For the foregoing reasons, the Turtles have convinced us to reverse the judgment of the district court. In summary, we first hold that Volusia County's incidental take permit does not authorize it to take protected sea turtles through purely mitigatory measures associated with artificial beachfront lighting.

Second, we hold that the Turtles have standing to sue Volusia County under the ESA's "take" prohibition for its regulatory actions affecting light users in Ormond Beach and New Smyrna Beach (that is, the imposition of the Minimum Environmental Standards for Sea Turtle Protection as contained within Ordinance 89-60, as amended), but not those municipalities' independent enforcement efforts. We likewise hold that the Turtles have standing to sue Volusia County for its regulatory actions affecting light users in Daytona Beach and Daytona Beach Shores (that is, the exemption from the Minimum Environmental Standards for Sea Turtle Protection as contained within Ordinance 89-60, as amended). Furthermore, we hold that the district court possesses the power to fashion a remedy that both constitutionally redresses the alleged "harm" and respects the scope of Volusia County's regulatory authority within those four municipalities.

Finally, we hold that the district court abused its discretion in denying the Turtles' motion for leave to

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seeking to expand the relevant nesting period beyond October 31 of each year. Rather, the Turtles' one-time reference to "December 31" appears to be a scrivener's error since their prayer for permanent injunctive relief states "October 31."

amend its original complaint and add the endangered leatherback sea turtle as a party. In light of the foregoing holdings, we remand this case for further proceedings consistent with this opinion, including a trial on artificial beachfront lighting (absent the timely intervening issuance of an incidental take permit).

REVERSED and REMANDED.

RONEY, Senior Circuit Judge, dissenting:

I respectfully dissent, largely on the reasoning of the district court Order deciding that the issuance by the Department of the Interior's U. S. Fish and Wildlife Service of an Incidental Take Permit renders this case moot. I understand the technical points and reasoning that argue for a contrary conclusion, but sometimes it is important to step back and view the fabric as a whole, especially when considering important conservation issues Congress committed to the expertise of an administrative agency.

The issues concerning the endangered turtles, of course, are not moot. The very fact they are covered by the Act reflects that serious measures must be taken in order to preserve the species. It is important that there be efficient and effective measures to protect all endangered turtles, but Congress has wisely assigned to the Department of the Interior extensive responsibilities under the Endangered Species Act. *See Babbitt v. Sweet Home Chapter, Communities for Great Oregon*, 515 U.S. 687, 708 (1995)

("When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary."). Along with these responsibilities comes the power to permit incidental "takes" as long as those takes do not threaten the continued existence of the species. *See* 16 U.S.C. § 1539(a) (1994). "The permit process requires the applicant to prepare a 'conservation plan' that specifies how he intends to 'minimize and mitigate' the 'impact' of his activity on endangered and threatened species, 16 U.S.C. § 1539(a)(2)(A)." *Sweet Home*, 515 U.S. at 700. It does not make sense to litigate in federal court the issue of incidental takes caused by artificial lights when those lights are regulated by the conservation plan provisions of a valid Incidental Take Permit. *Compare National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1044-45 (D.C. Cir. 1977), *cert. denied*, 118 S. Ct. 2340 (1998) (when incidental take permit holder proposes to violate conservation plan, new take permit may be required).

As I understand it, there are two kinds of takings involved here. Baby turtles born at night crawl to the light, nature having made that light the reflection of the moon on the water. Artificial shoreline lighting and vehicular lighting disorients these turtles and instead of crawling to the water, they crawl away from the water. One kind of taking as a result is undisputed: the killing of the turtles by motor vehicles driving on the beach during this period. The plaintiffs concede that the Permit covers the incidental taking that occurs by motor vehicles as a result of the disorientation from artificial shoreline lights, as well as lights on the vehicles themselves.

Whether there is any taking due to shoreline artificial lights other than by vehicles is in dispute. The U.S. Fish

and Wildlife Service has implemented an Artificial Beachfront Lighting Management Plan, however, which is designed to modify to the extent practical the lighting that disorients turtles during the critical nesting periods. This plan requires a detailed survey of artificial beachfront lights and contemplates more restrictive lighting regulations in the near future, all under the direct supervision of the U.S. Fish and Wildlife Service.

The Endangered Species Act authorizes the Department of the Interior to permit incidental "takes." The language focuses on the incidental takes themselves, rather than the activity that actually causes the takes. 16 U.S.C. § 1539(a)(1)(B). I would agree with the Ninth Circuit's reasoning that where incidental takes are "clearly contemplated by the incidental take statement," they are excepted from liability under the Endangered Species Act. *Ramsey v. Kantor*, 96 F.3d 434, 442 (9th Cir. 1996). *See also Hamilton v. City of Austin*, ___ F. Supp. ___ (W.D. Tex. June 16, 1998) (incidental take permit not required where valid scientific permit to take endangered salamander had been granted by U.S. Fish and Wildlife Service).

The Permit includes not only the two plaintiff turtle species, but the leatherback turtle, which plaintiffs sought to include as a party plaintiff, and two other species of turtles as well. It requires Volusia County to work with experts from the U.S. Fish and Wildlife Service, the Florida Department of Environmental Protection, the local lighting company, and even the municipalities of Daytona Beach and Daytona Beach Shores.

The conservation plan approved by the U.S. Fish and Wildlife Service requires Volusia County within one year

to conduct an extensive survey of all artificial lights along its beachfronts and document any problems that might be caused by those lights. It requires Volusia County over the following two years to correct any of those problems. Only then, if it proves impractical or cost prohibitive to correct any remaining problems, might the issuance of an Incidental Take Permit be necessary.

Common sense would dictate that the Agency would not implement such a plan if it did not permit such incidental taking as might occur during the management plan, if any, in addition to the taking through vehicular activity. If the agency does not properly protect the interests here involved under the statute, the parties have a remedy through the Administrative Procedures Act. In my judgment, it is a serious mistake, a waste of government resources, and an unjust expense to the parties to try to run parallel litigation of these issues in the district court while the problem is under the management of the federal agency.

Even if this case were not moot, I would invoke the primary jurisdiction doctrine and stay the case pending further administrative proceedings before the U.S. Fish and Wildlife Service. The primary jurisdiction doctrine is a flexible tool that is designed to allocate efficiently fact finding between the federal courts and administrative agencies. *See United States v. Western Pac. R. Co.*, 352 U.S. 59, 63-64 (1956). The doctrine is "applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency. . . . Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has

discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993).

This case involves a question of fact – whether artificial beachfront lighting "takes" sea turtles – that is not only within the special competence of the U.S. Fish and Wildlife Service, but is actually being reviewed by that agency. The Incidental Take Permit requires Volusia County to provide the U.S. Fish and Wildlife Service with information regarding lights which potentially disorient turtles and, if necessary, develop an appropriate mitigation plan. If the U.S. Fish and Wildlife Service determines that artificial beachfront lighting does indeed "take" turtles but does not threaten the continued existence of the species, then it is empowered by statute to craft a flexible solution to the problem of incidental takes. In this case, the U.S. Fish and Wildlife Service has already issued an Incidental Take Permit that comprehensively regulates artificial beachfront lighting. Invoking the primary jurisdiction doctrine would avoid a judicial solution that might conflict with the regulatory scheme already approved by the appropriate administrative agency. *See Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1350 (D.N.M. 1995). Considering the statutory responsibilities given to the Secretary of the Interior Department by Congress when it passed the ESA, I would hold in this case that the U.S. Fish and Wildlife Service is in a better position than a federal court to resolve the dispute at this time.

In any event, there seems to be no question that the district court case is moot if the Incidental Take Permit

includes, in addition to takings by motor vehicles, such other takings, if any, caused by artificial lights. If that issue is indeed in doubt, this Court could simply require a stay of the district court proceedings while the defendant repairs to the Agency to get a clarification on that point.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LOGGERHEAD TURTLE et al.,

Plaintiffs

-vs-

THE COUNTY COUNCIL OF VOLUSIA COUNT [sic] FLORIDA,

Defendant

_____/

CASE NO. 95-587-CIV-ORL-22

ORDER

(Filed Dec. 20, 1996)

This cause comes before the Court on Volusia County's Motion to Dissolve Preliminary Injunction and Dismiss Case (Doc. 141) and the Plaintiffs' Memorandum of Law in Opposition (Doc. 143). Plaintiffs have sued the County under the Endangered Species Act ("ESA"), contending that two types of County-regulated activities impact federally protected sea turtles, beach driving and artificial lighting.

In order to comply with the ESA, Volusia County sought an incidental take permit from the United States Fish and Wildlife Service. Under the "incidental taking" provision of Endangered Species Act, a person may receive a permit to "take" endangered or threatened species and thus avoid violating the Act. The holder of such a permit is not liable for any taking that falls within the

scope of the incidental taking permit authorized by the Secretary of the Interior. An applicant for a taking permit must apply to the Secretary of the Interior, and submit with the application a conservation plan. *See* 16 U.S.C. § 1539(a). Congress has mandated that the Secretary may issue an incidental taking permit only upon finding that "(i) the taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will ensure that adequate funding for the [conservation] plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (v) the measures, if any, required [by the Secretary as necessary and appropriate for the purposes of the conservation plan] will be met." *See* 16 U.S.C. § 1539(a)(2)(B). On November 21, 1996, Fish and Wildlife issued a five-year Incidental Take Permit to Volusia County under the Endangered Species Act.

Volusia County seeks dismissal of the instant case, arguing that the underlying issues in the case are mooted by the County's receipt of an Incidental Take Permit ("the Permit") from Fish and Wildlife. Plaintiffs do not dispute that County-regulated beach driving no longer violates the "takings" clause of the Endangered Species Act. Rather, Plaintiffs argue that County-controlled artificial lighting activities still "take" sea turtles in violation of the ESA because such artificial lighting activities were not included in the Permit. Thus, Plaintiffs contend, "takings" claims arising from artificial lighting activities are not moot and the case should not be dismissed.

In discussing the power Congress entrusted to the Department of Interior to interpret and apply provisions

of the Endangered Species Act, the Supreme Court has said the following:

> When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. *See* 16 U.S.C. §§ 1533, 1540(f). The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress. Fashioning appropriate standards for issuing permits under § 10 for takings that would otherwise violate § 9 necessarily requires the exercise of broad discretion. . . . When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his. . . . In the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for, as all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors. These questions must be addressed in the usual course of the law, through case-by-case resolution and adjudication.

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S.Ct. 2407, 2418 (1995) (citations omitted). Thus, the Supreme Court has held that the Endangered Species Act vests broad discretion in the Department of Interior (and the Fish and Wildlife Service) to issue incidental take permits.

Section G of the Incidental Take Permit granted to Volusia County on November 21, 1996 describes those activities which "will be employed" by the County to "ensure that take is minimized and mitigated." Doc. 141,

Ex. 1 at 3. Among the fifteen categories of mitigation activities, is a provision for a "Beach Lighting Management Plan." The Permit calls for the County to:

a. identify the jurisdictional boundaries;

b. categorizes the lighting environments;

c. determine the adequacy of existing ordinances and codes within each jurisdiction and the related enforcement;

d. develop an approach for addressing lighting issues for each coastal lighting category;

e. evaluate the coastline to determine where lighting modifications are feasible and cost effective;

f. coordinate implementation of lighting ordinances (if cost effective) in currently exempt municipalities;

g. develop a program to assist coastal property owner to comply with lighting guidelines;

h. develop a public awareness program to promote turtle-friendly lighting;

i. develop a long-term maintenance program.

The County is required to comply with the above ten permit conditions within one year, by November 1997. In addition, the Permit requires the County, in conjunction with the Fish and Wildlife Service, to conduct lighting surveys at least monthly during sea turtle nesting season; to provide light management training through workshops and manuals; and to bring all County-controlled lights into compliance by May 1, 1997 (with verification by Fish and Wildlife).

Plaintiffs argue that the Permit does not authorize takings from artificial lighting. As Plaintiffs properly point out, the issue is whether the County is liable for any takings that fall "within the scope" of the Incidental Taking Permit. The Court finds that the comprehensive artificial beachfront lighting restrictions, imposed by the Permit to mitigate "takings," are within the scope of the Permit for two reasons. First, the mitigation requirements on artificial lighting are so broad that they exceed the Court's own jurisdiction in this case (under the ESA) to restrict lighting in exempt municipalities, not under the County's control.

Second, through Fish and Wildlife's inclusion in the Permit of a comprehensive plan to manage and document *potential* "takings" from artificial lighting, it is clear that the Service intends to monitor the harm from artificial lighting and amend the Permit if necessary to provide for such takings. *Compare Friends of Endangered Species, Inc. v. Jantzen*, 760 F. 2d 976, 983-84 (9th Cir. 1985) (holding incidental take permit which was "expressly made subject" to reconsideration based on continuing monitoring and other mitigation provisions to be significant and within the scope of the permit).

In arguing that the Permit only covers takings as a result of beach driving and excludes artificial lighting, Plaintiffs rely on a letter from a Fish and Wildlife Officer to the County dated August 14, 1996. Doc. 143, Ex. A. However, in an affidavit of the same Fish and Wildlife officer, filed with the Court two months later, on October 3, 1996, the Officer states that the County will be required to mitigate the impact on sea turtles from artificial beachfront lighting as part of the Permit. Doc. 131, Affidavit of

David L. Hankla ¶ 6. Clearly, the Fish and Wildlife Service changed its position on whether the Permit would cover artificial lighting *after* the letter on which Plaintiffs rely was completed. Plaintiffs have failed to provide any case law, nor has the Court locate [sic] any case law, which would require this Court to find that a "mitigation" requirement is not within the scope of an incidental take permit.

To the contrary, the Court has been able to find only one case, addressing a different section of the ESA, which stated that compliance with the conditions of the incidental take permit would preclude the Court from finding a violation of the ESA. "If the private party complies with the requirements of the incidental take permit, any taking of a listed species will not violate ESA Section 9. See 16 U.S.C. § 1539(a)(1)(B)." *Ramsey v. Kantor,* 96 F.3d 434,439 n.6 (9th Cir. 1996) (comparing the informal consultation process under 16 U.S.C. § 1536 with the more rigorous process required under § 1539).

The Court finds that artificial beachfront lighting activities are within the scope of the November 21, 1996 Incidental Take Permit issued to Volusia County. As such, the remaining issues in the case are mooted and the case is due to be dismissed. It appears to the Court that the Plaintiffs only recourse, if they are dissatisfied with the terms of the Permit, is to bring suit under the Administrative Procedures Act.

Based on the foregoing it is ordered as follows:

1. Volusia County's Motion to Dissolve Preliminary Injunction and Dismiss Case (Doc. 141) is GRANTED. The case is DISMISSED.

2. The Clerk is directed to CLOSE the file.

DONE AND ORDERED in Chambers, Orlando, Florida, this 20th day of December, 1996.

/s/ Anne C. Conway
ANNE C. CONWAY
United States
District Judge

Copies to: Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LOGGERHEAD TURTLE, et al.,

Plaintiffs

CASE NO.
95-587-CIV-ORL-22

-vs-

THE COUNTY COUNCIL OF
VOLUSIA COUNTY, FLORIDA,

Defendant

_____/

ORDER

(Filed Jul. 9, 1996)

This cause comes before the Court on Volusia County's Motion for Partial Summary Judgment as to Artificial Beachfront Lighting Ordinances (Doc. 65) and Plaintiffs' Motion for Leave to Amend and Add Party (Doc. 59).

I. Background facts and procedural history[1]

At the preliminary injunction stage, the Court found that the evidence overwhelmingly supported the conclusion that artificial beachfront lighting harms and harasses the Loggerhead and Green sea turtles within the meaning of the Endangered Species Act. The evidence showed that artificial beachfront lighting significantly increases the

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[1] The facts are adopted from the Court's August 1, 1995 Order on Plaintiffs' Motion for Preliminary Injunction. Doc. 38.

incidence of injury to and mortality of sea turtle hatchlings. It is well-established that artificial lighting from buildings, streetlights, beach lamps, and nearby vehicles cause disorientation (loss of bearing) and disorientation (incorrect bearing) in sea turtle hatchlings, which are frequently fatal. Artificial illumination also interferes with the nesting efforts of mother sea turtles, resulting in aborted nesting attempts with greater frequency in areas with bright beach-front lights. Based on this evidence, the Court found the evidence decidedly favored the conclusion that artificial lighting is responsible for the "taking" of these sea turtles on the beaches of Volusia County. The remaining issue was to what extent the County caused the "takings."

Volusia County enacted Ordinance 90-22 to regulate public street lights and artificial private lighting along the unincorporated beach areas and in the coastal town of Ponce Inlet. Volusia County contends that its lighting ordinance was designed to limit interference and misorientation among sea turtles during nesting season. The evidence indicates that Volusia County has worked with the local power company to enforce the County's lighting ordinance when known violations are brought to the County's attention.

Ordinance 90-22 also excluded Daytona Beach and Daytona Beach Shores and did not apply to incorporated area of the County if these municipalities adopted the Minimum Environmental Standards for Sea Turtle Protection set forth in Ordinance 8960. These municipalities were permitted and have undertaken the responsibility of enforcing their own lighting ordinance for public street lights and private beachfront lighting.

Plaintiffs claim that Volusia County's current lighting ordinance is ineffective in preventing disorientation of sea turtles because it exempts several beachfront municipalities, so that the County essentially permits those municipalities to enforce a beachfront lighting ordinance which is not "turtle-friendly." The Plaintiffs have not named these exempted municipalities as Defendants in the instant lawsuit although after the Court's ruling on Plaintiff's Motion for Preliminary Injunction, Plaintiffs served the mayor of Daytona Beach Shores with a notice of intent to sue. Doc. 65, Exh. A. Plaintiffs proposed at the preliminary injunction hearing that the Court issue an injunction compelling the County to enforce county-wide Florida's "Model Lighting Ordinance for Marine Turtle Protection."

The Court found that Volusia County's lighting ordinance does not violate, in and of itself, the Endangered Species Act. The Court declined to order the County to adopt the "Model Lighting Ordinance for Marine Turtle Protection" on separation of powers grounds. At the preliminary injunction stage, the Court found that Volusia County has a lighting ordinance in effect, adopted with the protection of the sea turtles in mind, and that Volusia County had sought to enforce this ordinance where violations have been identified in the unincorporated beach areas or the Town of Ponce Inlet.

The Court pointed out that, if the Plaintiffs have a complaint against the beachfront illumination ordinances adopted by municipalities exempt from the County's lighting regulations, the Plaintiffs could bring suit under the Endangered Species Act against those cities. "The Court would be on unstable constitutional ground if it

attempted to compel the County to enforce Plaintiffs' model lighting ordinance in the city of Daytona Beach after Daytona Beach was granted, by valid ordinance, the authority to regulate its own lighting." *See* Doc. 38. The Court further determined that since Daytona Beach was not a party to the instant action, the Court was unable to assess the impact of Daytona Beach's beachfront lighting regulations and policies. *Id.*

II. Justiciability

The County contends that it is entitled to summary judgment on the artificial beachfront lighting issue because Plaintiffs lack standing to assert claims against the County based on the alleged regulatory actions of municipalities with independent lighting ordinance. If Plaintiffs cannot demonstrate that their claims will be redressed by the Court's rulings, then Plaintiffs lack standing and the Court is without jurisdiction to decide their claim on the issue.

The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In response to a summary judgment motion, the plaintiff cannot rest on "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," which for purposes of the summary judgment motion will be taken to be true. *Id.* at 561 (quoting from Fed. R. Civ. P. 56(e)).

To have standing, within the meaning of "case or controversy" requirement for federal court jurisdiction, the plaintiff must have suffered injury in fact, that injury must be fairly traceable to conduct of defendant, and that

court must have the power to redress the injury. *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800, 805 (11th Cir. 1993), *cert. denied sub nom. Southern Timber Purchasers Council v. Meier*, 114 S.Ct. 683 (1994); *see also Natural Resources Defense Council v. United States EPA*, 25 F.3d 1063, 1067 (D.C. Cir. 1994); *Florida Key Deer v. Stickney*, 864 F. Supp. 1222, 1224 (S.D. Fla. 1994). The Eleventh Circuit has alternatively described the injury-in-fact requirement as the need for plaintiff to present "specific, concrete facts" showing that the challenged conduct will result in a "demonstrable, particularized injury" to the plaintiff so that the plaintiff "personally w[ill] benefit in a tangible way" from court action. *Cone Corp v. Florida Dep't of Transportation*, 921 F.2d 1190, 1205 (11th Cir. 1991), *cert. denied*, 500 U.S. 942 (1991).

The County's challenge to Plaintiffs' standing centers on the causation and repressibility prongs of the standing doctrine. There is no dispute that the turtles may be injured by artificial beachfront lighting. The County argues that the potentially injurious lighting policies are those of separate municipalities, who have sovereign power to determine their own lighting policies. To demonstrate causality, the injury must be "fairly traceable" to the challenged action of the County, and not the result of the independent action of third parties not before the Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiffs contend that a causal connection exists between injury to the turtles and the County's promulgation of Ordinance No. 89-60 (entitled "Volusia County Minimum Environmental Standards for Sea Turtle Protection"). Plaintiffs argue that ordinance 89-60, which allows

the municipalities to pass independent sea turtle lighting ordinance subject to Volusia County Council approval, *causes* the death and injuries to sea turtles. Plaintiffs' reasoning remains deficient in the same respects the Court cited in its August 1, 1995 Order, which denied injunctive relief on this claim. First, Plaintiffs fail to allege facts sufficient to show that Volusia County is prohibited from allowing its separate cities and townships from regulating their own beachfront lighting. As the Court has stated previously, it "would be on unstable constitutional ground if it attempted to compel the County to enforce Plaintiffs' model lighting ordinance in the city of Daytona Beach after Daytona Beach was granted, by valid ordinance, the authority to regulate its own lighting." Doc. 38.

As the Court clearly indicated in the August 1 Order, the separate and independent municipalities, such as Daytona Beach, are third parties individually responsible for the sea turtle takings (*if* any takings have resulted) from those third parties' beachfront lighting policies; injuries from independent lighting policies, and the redressability of those injuries, were impossible for the Court to assess on August 1, 1995 because those third parties, and their lighting policies, were not properly before the Court as defendants. Undoubtedly, if the municipalities were defendants in the case, Plaintiffs would satisfactorily allege a "causal connection between the alleged injury" and the enjoinment requested by Plaintiffs. *See Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). However, Plaintiffs have failed to show a nexus between the alleged injuries to the turtles caused by the County's adoption of the ordinance.

Plaintiffs also mistakenly contend that the Court has the power to redress the alleged injury to the turtles. This is clearly not the case since, without joinder of the independent municipalities as defendants, the Court does not have jurisdiction over them to enjoin implementation of their separate lighting ordinances. The Plaintiffs argue, in a very circular fashion, that the Court can invalidate Volusia County's Ordinance 89-60, and by extension automatically invalidate the municipalities' lighting ordinances, because Ordinance 90-22 "results" in harm to sea turtles. First, as discussed *supra*, Plaintiffs have failed to demonstrate a causal connection, or that Ordinance 89-60 "results" in harm to the turtles. Second, Plaintiffs argue that the County's delegation of authority to regulate beachfront lighting "could result" in injury "if" municipalities enacted improper ordinances. The Court must have personal jurisdiction over the municipalities if it is to determine whether they enacted ordinances that injure the turtles. Third, Plaintiffs cite absolutely no authority for invalidating an Ordinance which was properly promulgated.

Plaintiffs cite *Defenders of Wildlife v. Administrator EPA*, 882 F.2d 1294 (8th Cir. 1989), for the proposition that a "governmental body that authorized the person's actions can be found to have committed a prohibited "take" in violation of the Endangered Species Act." Doc. 68 at 4. *Defenders* is easily distinguished from the instant case because it involved a federal agency, the EPA, which is specifically required to "further the purposes" of the Endangered Species Act. *Id.* at 1299. "In the [Endangered Species Act], Congress declared that 'all [f]ederal . . . agencies shall seek to conserve endangered species and

threatened species and shall utilize their authorities [to further] the purposes of this [Act]'. . . . The ESA thus imposes substantial and continuing obligations on federal agencies." *Id.* There is no such extraordinary obligation on the County in this case. Based on the foregoing, the County's Motion for Partial Summary Judgment on the artificial beachfront lighting issue is granted.

III. Plaintiffs' Motion for Leave to Amend and Add Party

Plaintiffs seek leave to amend the Complaint and add the leatherback turtle *(Dermochelys coriacea)*, an endangered species,[2] as a plaintiff to their suit. Plaintiffs allege that the leatherback turtle nests on Volusia County beaches beginning in February and that sea turtles remain on the County's beaches after October 31. Plaintiffs contend that adding the leatherback turtle as a party to the action will facilitate a full determination of the County's impact on sea turtles.

a. Standard for amendment

The Supreme Court set forth the standard to be employed by the district courts in granting leave to amend under Federal Rule of Civil Procedure 15(a):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason such as undue

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[2] 50 C.F.R. § 17.11 (1994).

> delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). "After a responsive pleading has been served, the standards for adding parties are the same whether the motion is made under Rule 15 or Rule 21 since both require the permission of the court." 3A J. Moore, J. Lucas and G. Grotheer, *Moore's Federal Practice* § 21.05[1] at 21-25 (2d ed. 1995).

Plaintiffs seek to amend the period of alleged "takings" in the Complaint to include the period from February 1 to after October 31. The Plaintiffs fail to allege any facts whatsoever to support amendment of the Complaint to include "takings" of turtles after the end of October. This amendment will be denied.

Plaintiffs seek to add the leatherback turtle as a party and to extend the allegations of the "takings" period to include the leatherbacks breeding season which includes February, March, and April. Plaintiffs allege that eleven (11) leatherback turtle nests were laid on the County's beaches during breeding seasons 1983 to 1992.[3] Plaintiffs contend that the figure underrepresents the true number

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[3] Plaintiffs rely on a report published in June 1995 by the Florida Marine Research Institute, entitled, "Sea Turtle Nesting Activity in the State of Florida 1979-1992" ("FMRI Report"). Doc. 59, Exh. 1.

of leatherback nests in Volusia County because the leatherbacks begin nesting as early as February, though the nesting surveys, on which Plaintiffs rely, do not commence until late April or early May.[4]

The County opposes the addition of the leatherback turtle as a party for three reasons: Plaintiffs have not served the County with a written notice of intent to sue with regard to the leatherback turtle; Plaintiffs fail to explain why they did not move to amend earlier; and Plaintiffs fail to allege that the County has caused a take of any leatherback turtles.

The County opposes Plaintiffs' amendment of the Complaint to add the leatherback turtle, contending that such an amendment would be futile since Plaintiffs have failed to provide written notice of their intent to bring suit against the County for violating the Endangered Species Act Section 1540(g)(2)(A)(i) requires that 'Judgment action may be commenced under [the citizen suit paragraph] prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation." 16 U.S.C.A. § 1540(g)(2)(A)(i) (West 1985). A significant number of courts have interpreted the sixty-day notice of

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[4] The FMRI Report states that "leatherbacks nest in Florida as early as late February. Nesting continues into August in some years, and there is one record in early September." Doc. 59, Exh. 1 at 14. A second report published in 1992 by the National Marine Fisheries Service and U.S. Fish and Wildlife Service, entitled "Recovery Plan for Leatherback Turtles in the U.S. Caribbean, Atlantic and Gulf of Mexico" ("USFWS Report") states that nesting commences in March (a very few nests are laid in February) and continues into July. Doc. 59, Exh. 2 at 8.

this subparagraph to be a jurisdictional prerequisite and have found they lacked subject matter jurisdiction over any claimed violations where such notice was not provided. *See, e.g., Save the Yaak Committee v. Block*, 840 F.2d 714, 721 (9th Cir. 1988) (court lacks jurisdiction where plaintiffs had not met 60-day notice requirement of the Act); *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1509 (D.Or. 1991) (same); *Protect Our Eagles' Trees v. City of Lawrence*, 715 F.Supp. 996, 998 (D.Kan. 1989) (16 days notice insufficient).

Plaintiffs' Complaint states that "[o]n March 23, 1995 Plaintiffs gave written notice of their intent to bring suit against Defendant for violating the Act to both Defendant and the Department of the Interior. . . . A copy of this written notice of intent to sue is attached to this Complaint as Exhibit B." Doc. 1 ¶ 4. There are no Exhibits attached to the Complaint in the Court file. It is Plaintiffs' burden to demonstrate that the Court has subject matter jurisdiction over the claims, and without the written notice of the intent to sue letter being on file with the Court, this Court is unpersuaded it has jurisdiction over claims involving the leatherback turtle.[5] The Court finds that it would be without subject matter jurisdiction to adjudicate the leatherback turtle claims and therefore any amendment to the Complaint would be futile; therefore, Plaintiffs' Motion to Add Party is denied.

Alternatively, the Court finds that Plaintiffs have unduly delayed in filing the Motion to Add Party. "[I]f

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[5] The County does not challenge the Court's subject matter jurisdiction over the loggerhead and green turtle claims.

the court determines that plaintiff has had sufficient opportunity to state a claim but has failed to do so, leave to amend may be denied." 6 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1487, at 645. In their Motion to Add a Party filed October 27, 1995, Plaintiffs fail to explain why the leatherback turtle was not named as a party in the Complaint filed on June 8, 1995, since the sea turtle surveys on which the Plaintiffs rely in moving to add the leatherback turtle were at the core of the allegations in the Complaint. Rather, Plaintiffs state vaguely that they "have learned that the leatherback turtle, an endangered species, nests on Volusia County beaches and is a proper party to this suit."

The procedural history of this case is atypical of a Track Two case,[6] in that the Court held a preliminary injunction hearing on July 31, 1995. Plaintiffs filed their Motion to Add Party nearly three months later. The Court cannot allow Plaintiffs to prejudicially add an additional species of sea turtle well after the preliminary injunction hearing was held, well after issues related to the taking of loggerhead and green turtles were argued, and well after the Court ruled on the likelihood of success only as to claims related to those two species. The impact of adding the leatherback turtle as a party, with its earlier breeding season, would be to foreclose the County's opportunity to litigate whether takings occurred of sea turtles during the period from February to April, since the Court would be asked to preliminarily enjoin the County from allowing

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[6] Local Rule 3.05(b) defines a Track Two case.

driving on the beach from February to October. Plaintiffs' Motion to Amend and Add Party is denied.

Based on the foregoing, it is ordered as follows:

1. Volusia County's Motion for Partial Summary Judgment as to Artificial Beachfront Lighting Ordinances (Doc. 65) is GRANTED.

2. Plaintiffs' Motion for Leave to Amend and Add Party (Doc. 59) is DENIED.

DONE AND ORDERED in Chambers, Orlando, Florida, this 9th day of July 1996.

/s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to: Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LOGGERHEAD TURTLE (*Caretta caretta*),
GREEN TURTLE (*Chelonia mydas*),
SHIRLEY REYNOLDS and
RITA ALEXANDER,

Plaintiffs,

-vs- CASE NO. 95-587-CIV-ORL-22

THE COUNTY COUNCIL OF VOLUSIA
COUNTY, FLORIDA, a political
subdivision of the State of Florida,

Defendant.

_____/

ORDER

(Filed Aug. 1, 1995)

This cause comes before the Court on Plaintiffs' Motion for Preliminary Injunction (Dkt. 2), Defendant's Emergency Motion to Strike Or, in the Alternative, Objections to Plaintiffs' Supplemental Exhibits (Dkt. 31), Defendant's Emergency Motion For Leave to File Supplemental Exhibits as to the Issue of Standing (Dkt. 35), and Defendant's Emergency Motion for Leave to File Its Request for Judicial Notice of the Volusia County Home Rule Charter (Dkt. 37).

The Plaintiffs are suing the Defendant County Council of Volusia County ("Volusia County") under the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g)(l)(A), for violating 16 U.S.C.

§ 1538(a)(1)(B), which prohibits the "taking" of a federally listed endangered species without a permit from the United States Fish and Wildlife Service. The Plaintiffs claim that Volusia County's beach-related ordinances regarding lighting and vehicular access pose an immediate danger to Loggerhead sea turtles and Green sea turtles, and that this threat of future injury necessitates a preliminary injunction to stop any unlawful taking.

After considering the arguments and exhibits submitted by the parties, the Court concludes that the Plaintiff's motion must be granted in part and denied in part, as explained below.

I. INTRODUCTION

The U.S. Fish and Wildlife Service has declared that the Loggerhead sea turtle is a "threatened" species. *See* 50 C.F.R. § 17.11. The Service also lists the Green sea turtle as "endangered" for the "breeding colony populations in Florida" *See* 50 C.F.R. § 17.11. Both of these species of sea turtle may be found generally in the tropical and temperate waters of the Earth's oceans.

Volusia County is located in northeast Florida and has some forty miles of coastline abutting the Atlantic Ocean. Both the Loggerhead and Green sea turtles are known to inhabit the Atlantic Ocean waters off of Florida, and come ashore onto the Florida beaches, including Volusia County beaches, to nest and lay their eggs. The U.S. Fish and Wildlife Service has not listed Volusia

County as a critical habitat for either species of sea turtle.[1]

A. Nesting Behavior of the Loggerhead and Green Sea Turtles

The nesting season in Florida for Loggerhead and Green sea turtles begins May 1st and continues until October 31st. During these months the adult female sea turtles come ashore at night to lay their eggs. On the shores of Volusia County's beaches, the sea turtles dig their nests and lay their eggs on the seaward edge of the dunes. The dunes form the western border of the beach, stretching parallel to the shoreline.

After choosing a spot for the nest, the adult female sea turtle digs a shallow cavity in the sand, and lays dozens of eggs into this cavity. The mother sea turtle then covers the eggs with sand and returns to the sea. The adult female Loggerhead and Green sea turtles do not have the maternal instinct to tend or return to their eggs once they have been laid.

In Florida Loggerhead and Green sea turtle eggs incubate for almost two months. After the incubation period, the sea turtle hatchlings break out of their shells. The hatchlings emerge from their sand nest during the night, when they sense the decrease in the temperature of the sand.

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[1] A study conducted by the Florida Marine Research Institute indicates that Volusia, County is the sight of 2.8 % of Loggerhead nesting activity in the State of Florida, and 3.1 % of Green sea turtle nesting activity.

For the sea turtle hatchlings to survive they must reach the sea soon after emerging from their nest. Under natural conditions, turtle hatchlings escape from the nest, orient themselves toward the sea, and reach the surf within several minutes. The turtle hatchlings instinctively orient themselves seaward by crawling toward the reflection of the night sky off the ocean waters and surf. Experts have concluded that "[t]he principal component of the sea-finding behavior of emergent hatchlings is a visual response to light." *See National Marine Fisheries Service and U.S. Fish and Wildlife Service,* "Recovery Plan for U.S. Population of Green Sea Turtle." National Marine Fisheries Service, Washington, D.C., p. 6 (1991); National Marine Fisheries Service and U.S. Fish and Wildlife Service, "Recovery Plan for U.S. Population of Loggerhead Sea Turtle." National Marine Fisheries Service, Washington, D.C., p. 8 (1991). Failure to reach the sea quickly greatly increases the likelihood that death will result due to exhaustion, dehydration, or predation from crabs or birds.

B. Volusia County's Beach-related Ordinances

1. Artificial beachfront lighting

Volusia County has enacted a lighting ordinance to regulate public street lights and artificial private lighting along the unincorporated beach areas and in the coastal town of Ponce Inlet. Pursuant to Volusia County ordinance, certain beachfront municipalities, such as Daytona Beach and Daytona Beach Shores, are permitted and have undertaken the responsibility of enforcing their own

lighting ordinance for public street lights and private beachfront lighting.[2]

Volusia County claims that its lighting ordinance was designed to limit interference and misorientation among sea turtles during nesting season. The evidence indicates that Volusia County has worked ~~with~~ the local power company to enforce the County's lighting ordinance when known violations are brought to the County's attention. The evidence suggests that Volusia County has installed or is in the process of installing special light fixtures for its street and beach lights in order to minimize the amount of illumination cast onto the beach which is harmful to sea turtle nesting behavior. The Plaintiff's expert, however, disputes the sufficiency of the County's efforts and the effectiveness of its lighting ordinance in reducing disorientation among sea turtles.

2. Driving motor vehicles upon the beach

Volusia County is empowered by the State of Florida to regulate vehicular access to the County's coastal beaches. *See* Fla. Stat. Ann. § 161.58 (West 1990). Volusia County permits vehicles to drive on its beaches, through its Beach Code the County regulates the time and circumstances under which vehicles are permitted on the beach. Pursuant to the County's Beach Code, vehicles are generally permitted to drive on the beaches from one hour before sunrise until one hour after sunrise. Volusia County has modified these times between the dates of

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[2] The Plaintiffs have not named these exempted municipalities as Defendants in the instant lawsuit.

May 1st and October 31st to accommodate sea turtle nesting season. From May 1st through June 30th, vehicular access is permitted from 7 a.m. until 8 p.m., and from July 1st through October 31st such access is permitted from 8 a.m. to 7 p.m. Evidence submitted by the Plaintiffs, however, strongly suggests that Volusia County has opened the vehicle gates or permitted private vehicles access to the beaches at earlier hours during the sea turtle nesting season.

In addition to permitting daytime traffic on the beach, Volusia County allows vehicles to park on the beaches until midnight. Volusia County also issues special permits to commercial fishermen, who then have authorization to drive upon the beach at night. Volusia County also authorizes public safety, beach ranger, and turtle patrol vehicles to drive on the beaches at night. It appears from the evidence that Volusia County is using or is in the process of acquiring for these county vehicles special yellow headlights in order to avoid disorienting sea turtles.

Volusia County's Beach Code also establishes and regulates the driving lanes and parking areas on the beach. The Beach Code provides for two lanes of traffic, one northbound and one southbound. The western edge of the southbound lane is set at the mean daily high tide line. The Beach Code establishes the parking zone as the area extending thirty feet west (landward) of the mean daily high tide line.

As part of its Beach Code, Volusia County has adopted a "conservation zone," which extends seaward

from the dunes for a distance of thirty feet. This "conservation zone" stretches the entire length of the coastline beach under Volusia County's jurisdiction. The dunes, and thus the "conservation zone," are a variable distance from the ocean waters at different sections of the Volusia County beaches. Driving is not permitted in the dunes. Volusia County permits vehicles to park up to fifteen feet into the "conservation zone" from the seaward side. The evidence before the Court strongly suggests that the conservation zone is not adequately marked to prevent private vehicles from parking and driving within the whole of the "conservation zone." More significantly, evidence submitted by the Plaintiffs indicates that private vehicles regularly drive and park within the entire "conservation zone."

Periods of high tide pose a major problem for maintaining the sanctity of this "conservation zone." At high tide, beach traffic is forced away from the ocean and further up the beach into the conservation zone. As a result, vehicles encroach upon the conservation zone both for driving and parking. Volusia County's Beach Director has the authority to close the beaches to vehicle traffic during high tide, or to regulate beach traffic as appropriate. Nevertheless, the evidence before the Court strongly suggests that this authority has not been exercised to prevent driving and parking within the prohibited areas of the "conservation zone."

C. Problems associated with beach driving and artificial beachfront illumination

1. Artificial beachfront illumination

Artificial beachfront lighting significantly increases the incidence of injury to and mortality of sea turtle hatchlings. It is well-established that artificial lighting from buildings, streetlights, beach lamps, and nearby vehicles cause disorientation (loss of bearing) and misorientation (incorrect bearing) in sea turtle hatchlings.

The effects of disorientation or misorientation are frequently fatal. Turtle hatchlings crawl toward the alternative light source or meander along the beach rather than head toward the sea. Hatchlings thereby become entangled in dune vegetation, or may be struck by vehicles after having crawled to nearby roadways. Hatchlings which have successfully navigated their way to the ocean may become misoriented in the surf or the waters just off the shore. Strong artificial lighting may even draw hatchlings out of the surf and back onto the beach. Thus misguided, turtle hatchlings inevitably succumb to exhaustion, dehydration, predators, or the weight of motor vehicles.

Artificial illumination also interferes with the nesting efforts of mother sea turtles. Loggerhead and Green sea turtles abort nesting attempts with greater frequency in areas with bright beachfront lights.

2. Beach driving

When automobiles are permitted to drive on the beaches where Loggerhead and Green sea turtles nest,

these species face significant peril. In the first place, vehicles leave tire ruts in the sand. Sea turtle hatchlings attempting to reach the ocean may be forced to negotiate these ruts. Hatchlings climbing over a rut may fall upon their backs and be stranded, inverted, for critical minutes while they attempt to right themselves. Hatchling sea turtles, having entered a tire rut, also have been observed to follow the tire rut to wherever it leads, rather than to pursue a course to the ocean. In both of these cases, the hatchlings are exposed for prolonged periods of time, and not uncommonly expire from dehydration, depredation, or are run over.

There is evidence in the record, however, suggesting that tire ruts closer to the shoreline on Volusia County's beaches are washed out by high tide. Volusia County has further undertaken to rake the beach every evening to smooth out any remaining tire ruts. There is a disagreement between the parties' experts as to the effectiveness of Volusia County's raking and rut-removal system.

Secondly, nighttime driving on the beach poses a number of hazards to the health and safety of Loggerhead and Green sea turtles. Headlights, like other artificial lighting, can disorient or misorient emergent hatchlings. Vehicles may run over sea turtle hatchlings as they attempt to reach the ocean, or hatchlings which are washed back up on the beach during periods of heavy surf. Vehicles may strike adult female sea turtles as they are nesting, or in transit to or from nesting. In addition, headlights may discourage adult female sea turtles from nesting and result in aborted nesting attempts.

Finally, driving on beaches where sea turtles nest can damage the nests themselves. Vehicles situated directly above a clutch (group) of sea turtle eggs can cause sand compaction which decreases successful incubation and directly kills sea turtle embryos. A vehicle which passes over a clutch of sea turtle eggs can cause one or more of the following life-threatening conditions: (1) increased pressure on the sand above the eggs, causing the paper-thin eggshells to burst and the developing embryos to perish; (2) increased pressure on the sand above the eggs, causing sand to be forced into the air spaces between eggs, decreasing the oxygen which can diffuse into the eggs and resulting in increased embryo mortality; (3) increased pressure on the sand above the eggs, crushing hatchlings that have come out of their shell but have not yet emerged from the nest; and (4) displacement of sand, exposing eggs to the elements and to predators, decreasing nesting success.[3]

D. Related Administrative Action

In 1994, the U.S. Fish and Wildlife Service warned Volusia County that permitting vehicular access to its beaches was resulting in the unlawful taking of turtles. Since that time, Volusia County asserts that it has been

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[3] On Volusia County's beaches, volunteers mark sea turtle nests and occasionally put cages around them. According to the Plaintiff's expert, studies show that even careful and diligent volunteers fail to discover eight percent of sea turtle nests. Hence drivers on the County's beaches may be running over nests without any awareness of what they are doing.

working in conjunction with U.S. Fish and Wildlife Service to develop a conservation plan, in order to minimize any harm to the sea turtle population. In conjunction with its conservation plan, Volusia County asserts that it has implemented a number of steps to minimize harm to nesting sea turtles. These steps include: (1) restricted beach access; (2) protecting the "conservation zone;" (3) hiring an environmental coordinator; (4) working with the volunteer "turtle patrol;" (5) raking the beach to remove tire ruts; and (6) enforcing a "turtle-friendly" lighting ordinance.

Volusia County has applied for an incidental Liking permit pursuant to 16 U.S.C. § 1539.[4] Volusia County filed its application for an interim incidental taking permit on July 17, 1995. Based upon time requirements for notice

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[4] Under the "incidental taking" provision of Endangered Species Act, a person may receive a permit to "take" endangered or threatened species. The holder of such a permit is not liable for any taking that falls within the scope of the taking authorized by the Secretary of the Interior. An applicant for a taking permit must apply to the Secretary of the interior, and submit with the application a conservation plan. *See* 16 U.S.C. § 1539(a). Congress has mandated that the Secretary may issue an incidental taking permit only upon finding that "(i) the taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such takings; (iii) the applicant will ensure that adequate funding for the [conservation] plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (v) the measures, if any, required [by the Secretary as necessary and appropriate for the purposes of the conservation plan] will be met." *See* 16 U.S.C. § 1539(a)(2)(B).

and publication in the federal register, a taking permit may be issued, if at all, no earlier than September 1995.

E. Present Action

The Plaintiffs claim that Volusia County's permitting beach driving results in and will continue to result in the death and injury of sea turtles, for the duration of the nesting season. The Plaintiffs also claim that Volusia County's lighting ordinance is ineffective to prevent disorientation among Loggerhead and Green sea turtles, and that Volusia County is thereby responsible for the subsequent harm visited upon these disoriented turtle hatchlings

The Plaintiffs now seek a preliminary injunction to prevent vehicular access to the County's beaches during the sea turtle nesting season. The Plaintiffs also seek a preliminary injunction compelling the County to enforce – throughout the whole county – the "Model Lighting Ordinance for Marine Sea Turtle Protection."

II. ANALYSIS

The Endangered Species Act is the most comprehensive legislation to protect endangered species ever enacted by any nation. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). "The plain intent of Congress in enacting [the Endangered Species Act] was to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth.*, 437 U.S. at 184.

The Endangered Species Act provides that, "with respect to any endangered species of Fish or wildlife

. . . it is unlawful for any person . . . to take any such species." 16 U.S.C. § 1538(a)(1)(B). By federal regulation it is likewise unlawful for any person to take any species listed as "threatened."

Congress defined the statutory term "take" to mean: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harass" has been defined by regulation as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." *See* 50 C.F.R. § 17.3. "Harm" has been defined by regulation as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *See* 50 C.F.R. § 17.3.

A. Volusia County's Affirmative Defenses

Volusia County has advanced several affirmative defenses as to why this case should not go forward. The Court addresses these arguments before turning to the merits of the Plaintiff's motion.

1. Standing

Volusia County attempts to derail the instant lawsuit by challenging the individual Plaintiffs' standing. Volusia County claims that Plaintiffs Shirley Reynolds and Rita

Alexander are not interested in saving the turtles, but only filed this action because they want to remove vehicles from the beaches for their own personal enjoyment.

A species protected under the Endangered Species Act has standing to sue "in its own right" to enforce the provisions of the Act. *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995).

The Court shall not inquire at this stage into the individual Plaintiffs' motivations in bringing the instant action. Since both the Loggerhead sea turtle (*caretta caretta*) and the Green sea turtle (*chelonia mydas*) are named Plaintiffs in this action, the case will proceed regardless of the motivations of Shirley Reynolds and Rita Alexander.

2. Primary Jurisdiction

Volusia County argues that the Court should stay or dismiss the instant action under the doctrine of primary Jurisdiction. Volusia County argues that the Court should refrain from advancing with the merits of this case because the U.S. Fish and Wildlife Service has worked with the County on a sea turtle conservation plan, and the County has now filed for an incidental taking permit.

" 'Primary jurisdiction' . . . comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its

views." *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 63-4, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956).

The Court concludes that the doctrine of primary jurisdiction is inapplicable to the present case. Enforcement of the Endangered Species Act here does not require the resolution of any issues by the U.S. Fish and Wildlife Service. The Court shall not have to determine whether the County's conservation plan will effectively minimize harm to the species, or determine to what degree the County's activities will affect the ability of the sea turtles to recover in population. Instead, the Court is called upon to ascertain whether the County's activities will likely result in future takings of protected sea turtles. This is no invasion of the Fish and Wildlife Service's expertise. The Service shall apply its expertise when it considers Volusia County's application for an incidental taking permit.

Moreover, the Court is not divested of jurisdiction over this case simply because the County has filed an application for an incidental taking permit. While the County may receive such a permit in the future, the pendency of the permit application is irrelevant to the question of whether or not the County's activities will result in the taking of a protected species tomorrow. *Cf. Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 809 (N.D. Ill. 1988) (in action to enjoin defendant from future dumping of pollutants beyond that allowed by defendant's permit, doctrine of "primary jurisdiction" not applicable merely because defendant has appeal pending before agency to increase amount of pollutants it can dump).

3. Res Judicata

Volusia County asserts that the instant action is barred by the doctrine of res judicata. The basis for this affirmative defense is the fact that, three years ago, Plaintiff Shirley Reynolds challenged the validity of Volusia County's ordinance permitting vehicular access to its beaches. This lawsuit, heard in state court, resulted in a decision upholding the County's ordinance. The judge in that case found that the permitting of vehicular access was a reasonable regulation of a customary right.

The judgment in the earlier case has absolutely no preclusive effect in the instant action. Res judicata requires the existence of four identities, including the identity of the cause of action. At the outset it is clear this identity is lacking. The Florida court case concerned questions of state property law and the reasonableness of county legislation. The instant case involves alleged takings of a federally protected species.

4. Laches

Volusia County argues that the instant action is barred by the doctrine of laches. Volusia County explains that driving has been permitted on its beaches over the past seventeen years that the Loggerhead and Green sea turtles have been federally protected. Volusia County argues that Plaintiffs' delay of seventeen years in bringing the instant lawsuit to enjoin vehicular access defeats any claim by the Plaintiffs that there is any "immediate and irreparable harm."

This argument is so tenuous as to be absurd. The vigor with which Volusia County advances this defense heightens, rather than diminishes, the absurdity. Two federally protected species are facing imminent injury and death on the beaches of Volusia County. The Supreme Court has read the Endangered Species Act to declare the loss of any species "incalculable." Volusia County cannot now thwart the intention of Congress by using as a shield the fact that for the last seventeen years it has continuously placed at risk the welfare of these federally protected sea turtles.

B. Test for Issuing a Preliminary Injunction

Under the customary standard, a party seeking a preliminary injunction must demonstrate to the court that (1) the moving party will likely succeed on the merits of the case, (2) the threatened harm is irreparable, (3) the balance of hardships favors the moving party, and (4) the preliminary injunction serves the public interest. *See Church v. City of Huntsville*, 30 F. 3d 1332, 1342 (11th Cir. 1994). This is not the test, however, for preliminary injunctions under the Endangered Species Act.

The broad language of the Endangered Species Act and the pronouncements of the Supreme Court persuade this Court that, in considering the entry of an injunction under the Endangered Species Act: (1) the Court does not have the "traditional equitable discretion" to balance the parties' interests, (2) any threatened harm is *per se* irreparable harm, and (3) the public interest always favors the

imposition of an injunction under the Act. *See, e.g., Tennessee Valley Auth.*, 437 U.S. at 174, 184; *Accord National Wildlife Fed'n*, 23 F.3d at 1511.

Volusia County argues that the Court, in deciding whether or not to impose a preliminary injunction, should consider the devastating effect on Volusia County if a preliminary injunction were granted. Volusia County also desires the Court to consider the County's efforts to the [sic] minimize harm which the County's beach-related policies inflicts upon the sea turtles. The County points to its working relationship with the "turtle patrol," the U.S Fish and Wildlife Service, and other such efforts undertaken to reduce the likelihood of the "taking" of protected sea turtles.

Congress gave the Secretary of the Interior the authority to weigh these circumstances in deciding whether to issue an incidental take permit. *See* 16 U.S.C. § 1539. The federal courts were not granted similar discretion in deciding whether to issue an injunction.

In *Tennessee Valley Authority*, the Supreme Court upheld the imposition of an injunction that stopped the federal government from completing the Tellico dam project. The Tellico dam, if completed and operated, would have eradicated a federally listed endangered species. The federal government had already spent tens of millions of dollars on the project. The Supreme Court observed that:

> [one might say] in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. But neither the Endangered

> Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations. On the contrary, the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as "incalculable." Quite obviously, it would be difficult for a court to balance the loss of a sum certain – even $100 million – against a congressionally declared "incalculable" value, even assuming we had the power to engage in such a weighing process, which we emphatically do not.

Tennessee Valley Auth., 437 U.S. at 187-8.

Volusia County points to language at the end of the Supreme Court's recent decision in *Babbit v. Sweet Home Chapter of Communities for a Greater Oregon*, 132 L.Ed.2d 597, 1995 WL 382088, 1995 U.S. LEXIS 4463 (June 29, 1995), as an indication that the Supreme Court has softened its stand on the strictness with which courts must construe their obligations under the Endangered Species Act.

In *Sweet Home*, the Defendant challenged the reasonableness of the Interior Department's regulation defining and interpreting the word "harm" as that term is used in the Endangered Species Act. The Supreme Court upheld the regulation, finding it was a reasonable exercise of the Secretary's authority. At the end of the Opinion of the Court, the Supreme Court observed that: "In the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for, as all recognize, the Act encompasses a vast range of

economic and social enterprises and endeavors. These questions must be addressed in the usual course of the law, through case-by-case resolution and adjudication." Volusia County argues that the Supreme Court, by way of the above-quoted dicta, intended for future courts to undertake a "case-by-case" consideration of the affected economic and social enterprises when considering cases under the Endangered Species Act. Volusia County thus concludes that this Court may consider all efforts undertaken by the County and the potential effect on the County in deciding the merits of the instant motion for preliminary injunction.

The Court agrees with the County in a limited sense. Under the Endangered Species Act, concepts such as "harm" and "harass" are subject to differing and complex analyses. An analysis of the concept of "significant habitat modification," for example, must take account of various fact-specific circumstances which can only be assessed within the context of the case itself.

As for a balancing of affected "economic and social enterprises," the language of the Act clearly leaves this job to the Secretary of the Interior and U.S. Fish and Wildlife Service. The provisions allowing incidental taking permits and hardship exemptions fall within the province of the Department of the Interior. *See* 16 U.S.C. § 1539. If Congress had wanted the federal courts to undertake a similar balancing of interests, it could have enacted such legislation. Such language is notably absent from the Endangered Species Act, and this absence gains increased significance from the fact that Congress has first-hand knowledge of the severe economic and social consequences which may be incurred as a result of this

lack of balancing. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

Nor does the Court find that this latest Supreme Court opinion in *Sweet Home* provides the authority to engage in such a balancing. The passage quoted above must be understood within the context in which it was written. The defendants in *Sweet Home* were challenging the reasonableness of the Interior Department's regulation defining harm as including "significant habitat modification." The defendants – small landowners, logging companies, families dependent on the forest product industries – asserted that the application of this regulation to several federally listed species, including the Northern Spotted Owl, had injured them economically. The Supreme Court upheld the regulation after considering the language, legislative history, and structure of the Endangered Species Act. In the paragraph immediately preceding the one quoted directly above, the Supreme Court noted that:

> The task of defining and listing endangered and threatened species requires attention to detail that exceeds the normal province of Congress. Fashioning appropriate standards for issuing permits under § 10 for takings that would otherwise violate § 9 necessarily requires the exercise of broad discretion. The proper interpretation of a term such as "harm" involves a complex policy choice.

Consequently, this Court reads the *Sweet Home* opinion as addressing the balancing of competing interests and policies which the Interior Department undertakes in issuing its regulations and taking permits, and not as giving the

lower courts license to balance related social and economic concerns.

Moreover, the broad scope and legislative history of the Act convinces the Court that a showing of threatened future harm to a protected species creates an irrebuttable presumption that the threatened harm is irreparable. *See, e.g.*, H.R. Rep. No. 93-412, p. 4-5 (1973) ("The value of this genetic heritage is, quite literally, incalculable"), *quoted in Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 178 (1978).

Volusia County argues that a preliminary injunction should not be entered since: (1) Volusia County is not a critical habitat for the Loggerhead and Green sea turtle, and (2) any "takings" that are occurring do not threaten the Loggerhead and Green sea turtle species with extinction.

Volusia County misreads the Endangered Species Act. It is irrelevant for the purposes of the Act whether the "taking" at issue involves a critical habitat or not. Moreover, the Act does not distinguish between a taking of the whole species or only one member of the species. *Any taking and every taking* – even of a single individual of the protected species – is prohibited by the Act. *See* 16 U.S.C. § 1538. Hence the future threat of a even single taking is sufficient to invoke the authority of the Act. *See Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 938 (D. Mont. 1992) (threatened extinction is not necessary for a finding of harm under the Endangered Species Act).

The Ninth Circuit has recently held that the future threat of harm to two members of a protected species is sufficient to invoke the provisions of the Endangered Species Act. *See Forest Conservation Council v. Rosboro*

Lumber Co., 50 F.3d 781 (9th Cir. 1995). In *Rosboro*, the defendant logging company proposed to clearcut timber in forty acres of land. The forty acres was located in an area that was a "threatened or endangered species site." A study had revealed that the clearcutting would occur on land adjacent to a nesting site of a pair of Northern Spotted Owls, a federally listed threatened species. The Ninth Circuit reversed the lower court's decision to dismiss the case on summary judgment, finding disputed issues of fact as to whether the logging would impair "essential behavior patterns" of the two owls.

Based on the analysis above, the Court concludes that petitioners seeking a preliminary injunction under the Endangered Species Act must show: (1) that the wildlife at issue is protected under the Endangered Species Act, and (2) that there is a reasonable likelihood that the defendant will commit future violations of the Endangered Species Act. *Accord National Wildlife Fed'n v. Burlington Northern R.R., Inc.*, 23 F.3d 1508, 1510-1511 (9th Cir. 1994).

The federal regulations are clear, and Volusia County does not contest, that both the Loggerhead sea turtle and the Green sea turtle are protected under the Endangered Species Act. Thus the only avenue of inquiry remaining for the Court is to determine whether the Plaintiffs have met their burden of showing that the County's conduct is reasonably likely to result in any "taking" of these protected species.

C. Volusia County's Lighting and Beachfront Illumination Ordinance

The evidence at this stage overwhelmingly supports the conclusion that artificial beachfront lighting harms and harasses the Loggerhead and Green sea turtles within the meaning of the Endangered Species Act. More specifically, the Court finds that the evidence decidedly favors the conclusion that artificial lighting is responsible for the "taking" of these sea turtles on the beaches of Volusia County.

Yet the more difficult legal question concerns what the Court can do about this "taking." The evidence suggests that Volusia County has a lighting ordinance in effect, that this ordinance was adopted with the protection of the sea turtles in mind, and that Volusia County has sought to enforce this ordinance where violations have been identified. The Plaintiffs claim that Volusia County's current lighting ordinance is ineffective in preventing disorientation of sea turtles. Plaintiffs further argue that Volusia County's lighting ordinance exempts several beachfront municipalities, so that the County essentially permits those municipalities to enforce a beachfront lighting ordinance which is not "turtle-friendly." The Plaintiffs propose that the Court issue an injunction compelling the County to enforce countywide Florida's "Model Lighting Ordinance for Marine Turtle Protection."

In the first place, the Court cannot conclude at this stage that Volusia County's lighting ordinance is reasonably likely to result in the taking of any sea turtles. There is insufficient evidence in the record on which the Court

can base a finding that specific lights for which Volusia County is responsible in the unincorporated beach areas or the Town of Ponce Inlet have disoriented sea turtles.

Secondly, if the Plaintiffs have a complaint against the beachfront illumination ordinances adopted by municipalities exempt from the County's lighting regulations, the Plaintiffs may bring a suit under the Endangered Species Act against those cities. There is no reason for the Court to believe that Volusia County is prohibited from allowing its separate cities and townships from regulating their own beachfront lighting. The Court would be on unstable constitutional ground if it attempted to compel the County to enforce Plaintiffs' model lighting ordinance in the city of Daytona Beach after Daytona Beach was granted, by valid ordinance, the authority to regulate its own lighting. Furthermore, since Daytona Beach is not a party to the instant action, the Court is unable to assess the impact of Daytona Beach's beachfront lighting regulations and policies.

Finally, the Plaintiffs have not presented the Court with any legal authority by which the Court has the power to tell the County to pass and enforce a specific piece of legislation. Volusia County's lighting ordinance does not violate, in and of itself, the Endangered Species Act. If it did, the Court could strike the ordinance down by authority of the Supremacy Clause. But by what authority may the Court compel the County to enforce a proposed item of local legislation? It may be that the Endangered Species Act vests such power in a federal court. This Court, however, will not exercise such authority without guidance from the higher courts.

In sum, the Court concludes that the Plaintiffs have not shown that Volusia County's artificial beachfront lighting ordinance is reasonably likely to "take" sea turtles in the future. Moreover, the Court declines to compel the County to enforce a different, stricter lighting ordinance, even with respect to those municipalities which, by the County's permission, have their own lighting codes.

D. Vehicular Access to Beaches

As a preliminary matter, the Court finds that since Volusia County has the authority to regulate vehicular access to its beaches, and since Volusia County permits others to drive upon its beaches, Volusia County assumes the responsibility for ensuring that those vehicles do not "take" federally protected species.

By the instant motion, the Plaintiffs request that the Court enjoin Volusia County from permitting any vehicles on its beaches. The Plaintiffs bear the burden of demonstrating that vehicular access to the County's beaches is reasonably likely to cause a future "taking" of protected sea turtles. The Court concludes that the Plaintiffs have partially met their burden, and that a limited injunction at this stage is mandated by the Endangered Species Act.

The evidence before the Court strongly indicates that nighttime driving on the County's beaches is likely to harass and harm Loggerhead and Green sea turtles. As the Court observed above, these turtles are placed at harm when vehicles drive upon their nesting grounds at

night. On Volusia County's beaches, misorientation, disorientation, and death of protected sea turtles are the direct byproducts of permitting vehicles with distracting headlights to drive upon the beach at night.

The Court concludes that Volusia County permits vehicles upon its beaches at night at the cost of "taking" federally protected sea turtles. As the County is responsible for the actions of those it permits to enter onto its beaches, the County is liable for the taking of these protected species. Consequently, the Court has no alternative but to enjoin the County from permitting private vehicles onto its beaches during the nighttime hours. In order to ensure that the beaches are clear during these hours, the Court enjoins the County from permitting any vehicles on its beaches from one hour before sundown until one hour after sunrise. The hour lag time before sundown will permit the County to ensure that all private vehicles are off the beach before nightfall. The hour lag time after sunrise will permit the County to ensure that there are no sea turtle hatchlings still lingering on the beach which could be run over.

The Court does not, by this injunction, ban those County vehicles which are equipped with yellow or "turtle-friendly" headlights and which are operated by or in conjunction with the County, including public safety, beach ranger, and turtle patrol vehicles.

The Court also finds that there is a reasonable likelihood of future takings of protected sea turtles if vehicles are permitted to park and drive in the "conservation zone." The evidence before the Court suggests that the Loggerhead and Green sea turtles lay their nests near the

dunes, in the area which Volusia County has termed the "conservation zone." The evidence also clearly demonstrates that vehicles drive and park with impunity throughout this "conservation zone." Such encroachment into this protective area is especially common during periods of high tide. By continuing to drive and park in the "conservation zone," vehicles on Volusia County beaches will likely continue to destroy emergent and pre-emergent sea turtle hatchlings. It is also likely that these vehicles will continue to leave tire ruts in the soft sand which will not be smoothed out by Volusia County's raking apparatus, and which ruts will trap and disorient sea turtle hatchlings.

Since the Plaintiffs have demonstrated that the future takings of sea turtles is likely if cars are permitted in the "conservation zone," the Court has no alternative under the Endangered Species Act but to enjoin Volusia County from permitting any vehicles to enter the "conservation zone." There is no exception to this injunction, and at times of high tide Volusia County will have to find a method of regulating beach traffic that does not include permitting cars up into the "conservation zone." Since the periods of high tide are known and published in advance, the Court expects the County to prepare a strategy to deal with this problem.

To reiterate, the Court enjoins Volusia County from permitting private vehicles upon its beaches at night and from permitting vehicles to drive and park within the conservation zone. As to the remaining vehicular traffic now permitted on Volusia County's beaches, the Court finds that the evidence does not demonstrate that daytime traffic is likely to result in the taking of protected sea

turtles. The evidence indicates that tire ruts created by vehicles are washed out by the high tide or are smoothed out by Volusia County. The parties' experts dispute the effectiveness of the County's rut-removal system. After reviewing the recent "turtle patrol" logs filed by the Plaintiffs, the Court concludes that the County's efforts may in fact be effective. At this stage, however, the Court is unable to definitively determine or find sufficient evidence in the record which indicates that daytime traffic which is kept out of the conservation zone will likely "take" Loggerhead or Green sea turtles.

If a trial on the merits reveals that the "taking" of protected sea turtles is reasonably likely even from daytime traffic, the Court shall at that time impose an appropriate remedy. Yet based upon the evidence before it, the Court cannot conclude that the taking of sea turtles is reasonably likely as a result of daytime traffic confined to permitted areas of the beaches of Volusia County.

E. Defendant's Emergency Motions

Defendant's [sic] has recently filed three emergency motions, one the day before the hearing on the preliminary injunction motion, and two during the following week. Defendant's emergency motions did not aid the Court in any way in resolving the motion for preliminary injunction. These "emergency" motions, which did not arise from any true emergency, served only to divert the Court's attention from a consideration of the merits of the case.

Belated exhibit filings and objections to Plaintiff's exhibits did not constitute the sort of emergencies which

required the Court to drop everything it was doing to consider these arguments. Defendants objections to the Plaintiffs' exhibits are noted. The other two motions were only emergencies because Volusia County failed to timely file exhibits in opposition to the motion for preliminary injunction. The Court declines to consider exhibits which were not filed within the prescribed period.

ACCORDINGLY it is **ORDERED** that Plaintiffs' Motion for Preliminary Injunction (Dkt. 2) is **GRANTED IN PART AND DENIM IN PART**. The Defendant is enjoined from permitting vehicles upon its beaches at night until November 1st, 1995, except as permitted by this Order. Furthermore, the Defendant is enjoined from permitting vehicles to enter the "conservation zone" until November 1st, 1995.

The Defendant may move for dissolution of this Order if and when it receives an incidental taking permit from the Secretary of the Interior.

It is **FURTHER ORDERED** that Defendant's Emergency Motion to Strike Or, in the Alternative, Objections to Plaintiffs' Supplemental Exhibits (Dkt. 31), Defendant's Emergency Motion For Leave to File Supplemental Exhibits as to the Issue of Standing (Dkt. 35), and Defendant's Emergency Motion for Leave to File Its Request for Judicial Notice of the Volusia County Home Rule Charter (Dkt. 37) are **DENIED**.

DONE AND ORDERED in Chambers, Orlando, Florida, this 1st day of August, 1995.

/s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to: Counsel of Record

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-2083

(Filed October 16, 1998)

LOGGERHEAD TURTLE (Caretta caretta); GREEN TURTLE (Chelonia mydas), *et al.*,

Plaintiff-Appellants,

versus

THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

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BEFORE: HATCHETT, Chief Judge, and RONEY and CLARK, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellee THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, is denied.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
CHIEF JUDGE

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16 U.S.C. § 1531. Congressional findings and declaration of purposes and policy

(a) Findings

* * *

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

* * *

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threaten species and shall utilize their authorities in furtherance of the purposes of this chapter.

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16 U.S.C. § 1532. Definitions

* * *

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion, of its range other than a species of the Class Insecta determined by the Secretary to constitute a

pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

* * *

(13) The term "person" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

* * *

(15) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

* * *

(17) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term "State agency" means any State agency, department, board, commission, or other governmental entity which is responsible for the management

and conservation of fish, plant, or wildlife resources within a State.

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

* * *

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16 U.S.C. § 1535. Cooperation with States

(a) Generally

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) Management agreements

The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements

shall be subject to the provisions of section 715s of this title.

(c) Cooperative agreements

(1) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program –

(A) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a

copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and

(E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened; or

that under the State program –

(i) the requirements set forth in subparagraphs (C), (D), and (E) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 1533(d) of this title or section 1538(a)(1) of this title with respect to the taking of any resident endangered or threatened species.

(2) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program –

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or

that under the State program –

(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 1533(d) or section 1538(a)(1) of this title with respect to the taking of any resident endangered or threatened species.

(d) Allocation of funds

(1) The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in

development of programs for the conservation of endangered and threatened species or to assist in monitoring the status of candidate species pursuant to subparagraph (C) of section 1533(b)(3) of this title and recovered species pursuant to section 1533(g) of this title. The Secretary shall allocate each annual appropriation made in accordance with the provisions of subsection (i) of this section to such States based on consideration of –

(A) the international commitments of the United States to protect endangered species or threatened species;

(B) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this chapter;

(C) the number of endangered species and threatened species within a State;

(D) the potential for restoring endangered species and threatened species within a State;

(E) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species;

(F) the importance of monitoring the status of candidate species within a State to prevent a significant risk to the well being of any such species; and

(G) the importance of monitoring the status of recovered species within a State to assure that such species do not return to the point at which the measures provided pursuant to this chapter are again necessary.

So much of the annual appropriation made in accordance with provisions of subsection (i) of this section allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.

(2) Such cooperative agreements shall provide for (A) the actions to be taken by the Secretary and the States; (B) the benefits that are expected to be derived in connection with the conservation of endangered or threatened species; (C) the estimated cost of these actions; and (D) the share of such costs to be borne by the Federal Government and by the States; except that –

(i) the Federal share of such program costs shall not exceed 75 percent of the estimated program cost stated in the agreement; and

(ii) the Federal share may be increased to 90 percent whenever two or more States having a common interest in one or more endangered or threatened species, the conservation of which may be enhanced by cooperation of such States, enter jointly into an agreement with the Secretary.

The Secretary may, in his discretion, and under such rules and regulations as he may prescribe, advance funds to the State for financing the United States pro rata share agreed upon in the cooperative agreement. For the purposes of this section, the non-Federal share may, in the

discretion of the Secretary, be in the form of money or real property, the value of which will be determined by the Secretary, whose decision shall be final.

* * *

(f) Conflicts between Federal and State laws

Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

* * *

(h) Regulations

The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

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16 U.S.C. § 1538. Prohibited acts

[ESA § 9]

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to –

* * *

(B) take any such species within the United States or the territorial sea of the United States;

* * *

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16 U.S.C. § 1539. Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe –

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is

incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies –

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that –

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

* * *

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16 U.S.C. § 1540
ESA § 11

(c) District court jurisdiction

The several district courts of the United States, including the courts enumerated in section 460 of Title 28, shall have jurisdiction over any actions arising under this chapter. For the purpose of this chapter, American Samoa shall be included within the judicial district of the District Court of the United States for the District of Hawaii.

* * *

(c) Enforcement

(1) The provisions of this chapter and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this chapter.

(2) The judges of the district courts of the United States and the United States magistrate judges may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this chapter and any regulation issued thereunder.

(3) Any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, to enforce this chapter may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation. Such person may make arrests without a warrant for any violation of this chapter if he has reasonable grounds to believe that the person to be arrested is committing the violation in his presence or view, and may execute and serve any arrest warrant, search warrant, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction for enforcement of this chapter. Such person so authorized may search and seize, with or without a warrant, as authorized by

law. Any fish, wildlife, property, or item so seized shall be held by any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, property, or item pursuant to paragraph (4) of this subsection; except that the Secretary may, in lieu of holding such fish, wildlife, property, or item, permit the owner or consignee to post a bond or other surety satisfactory to the Secretary, but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this chapter, as the Secretary shall by regulation prescribe.

(4)(A) All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this chapter, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

(B) All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving, carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this chapter, any regulation made pursuant thereto, or any permit or certificate issued thereunder shall be subject to forfeiture

to the United States upon conviction of a criminal violation pursuant to subsection (b)(1) of this section.

(5) All provisions of law relating to the seizures, forfeiture, and condemnation of a vessel for violation of the customs laws, the disposition of such vessel or the proceeds from the sale thereof, and the remission or mitigation of such forfeiture, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as such provisions of law are applicable and not inconsistent with the provisions of this chapter; except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this chapter, be exercised or performed by the Secretary or by such persons as he may designate.

(6) The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof.

(f) Regulations

The Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating, are authorized to promulgate such regulations as may be appropriate to enforce this chapter, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this chapter including processing applications and reasonable inspections, and with the transfer, board, handling, or storage of fish or wildlife or plants and evidentiary items

seized and forfeited under this chapter. All such fees collected pursuant to this subsection shall be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the services. Appropriated funds may be expended pending reimbursement from parties in interest.

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf –

> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or
>
> (B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or
>
> (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to

order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section –

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section –

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) in any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

* * *

CONSTITUTION OF THE UNITED STATES

* * *

ARTICLE [X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[ARTICLE XI.]*

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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* **Note:** This amendment was proposed by Congress on March 4, 1794; ratification was completed on February 1, 1795.

CONSTITUTION OF THE STATE OF FLORIDA

ARTICLE VIII
LOCAL GOVERNMENT

Sec.

1. Counties.
2. Municipalities.
3. Consolidation.
4. Transfer of powers.
5. Local option.
6. Schedule to Article VIII.

* * *

(c) GOVERNMENT. Pursuant to general or special law, a county government may be established by charter which shall be adopted, amended or repealed only upon vote of the electors of the county in a special election called for that purpose.

* * *

(g) CHARTER GOVERNMENT. Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

* * *

Volusia County Home Rule Charter

Sec. 202.4. Minimum standards for environmental protection.

The council, after consideration of such advice and comment as may be submitted by the governing bodies of municipalities within the county, shall establish minimum standards, procedures, requirements and regulations for the protection of the environment. Such minimum standards, procedures, requirements and regulations may include, but shall not be limited to, tree protection, aquifer protection, stormwater management, wastewater management, river and waterway protection, hazardous waste disposal, wetlands protection, beach and dune protection, environmental protection including air pollution, and the protection from destruction of the resources of the county belonging to the general public, and such other environmental standards as the council determines to be necessary for the protection of the public health, safety, and welfare of the citizens throughout Volusia County. The council shall establish such minimum standards, procedures, requirements and regulations shall apply within all the incorporated and unincorporated areas of Volusia County. In the event of a conflict between any standard, procedure, requirement or regulation established by a county ordinance, the county ordinance shall prevail within the municipality to the extent of any conflict; provided, however, the governing body of each municipality may establish more restrictive standards, procedures, requirements or regulations within the municipality for the protection of the environment.

(Res. No. 86-136, Amend. No. 3, 9-18-86)

* * *

Sec. 205. Unified countywide beach regulations.

Sec. 205.1. The beach: Public right of access and use.

The public has a right of access to the beaches and a right to use the beaches for recreation and other customary purposes. This right of access and use is a public trust, which the council shall by ordinance define, protect, and enforce. Because prohibiting motor vehicle access to the beaches would deny beach use to many, the council shall authorize, as permitted by law, vehicular access to any part of the beach not reasonably accessible from public parking facilities.

(Res. No. 86-136, Amend. No. 4, 9-18-86; Res. No. 96-121, Amend. No. 3, 6-20-96)

Sec. 205.2. Unified Beach Code.

The council shall have the power and it shall be its duty to enact an ordinance, to be known as the Unified Beach Code ("code"), comprehensively regulating public health, safety, and welfare on and pertaining to the beach, including, but not limited to, regulation of: individual conduct; pedestrian safety; vehicular access and fees; operation and parking of vehicles on beaches and approaches; and vendors, concessionaires, and special events. (Res No. 86-136, Amend. No. 4, 9-18-86; Res. No. 96-121, Amend. Nos. 1, 2, 6-20-96)

Sec. 205.3. Vehicular access fees.

The council shall have the exclusive power to impose a uniform, reasonable vehicular beach access fee, but no

other fee shall be charged for individual beach access or use. Revenues derived from vehicular access fees and all other revenues derived form the beach shall be expended solely for direct beach purposes permitted by law. Directly and by grants to municipalities, the council shall expend such revenues to maintain a uniform level of services responsive to use and demand. (Res. No. 86-136, Amend. No. 4, 9-18-86; renumbered Res. No. 96-121, Amend. No. 2, 6-20-96)

Sec. 205.4. Delivery of services on the beach.

No function or power relating to services is transferred from any municipality to the county. The municipalities may continue to deliver any services on their beaches, which shall not be duplicated by the county. However, if authorized by a municipality, the county shall assume, at the county's expense, any municipal beach service. (Res. No. 86-136, Amend. No. 4, 9-18-86; renumbered Res. No. 96-121, Amend. No. 2, 6-20-96)

Sec. 205.5. Effect of Unified Beach Code.

The county shall have jurisdiction over the coastal beaches and approaches as well as exclusive authority to regulate the beaches and public beach access and use. To the extent sovereign immunity has been waived, the county shall assume any governmental liability arising after the code takes effect for claims in areas controlled by the county under this article, including claims alleging failure to warn of dangers, but unless otherwise agreed, the county will not be liable for any act of a municipality.

Any ordinance enacted pursuant to this article shall prevail in the event of conflict with a municipal ordinance.

(Res. No. 86-136, Amend. No. 4, 9-18-86; renumbered Res. No. 96-121, Amend. No. 2, 6-20-96)

Sec. 205.6. Definitions of beach and approach.

"Beach" refers to lands and waters lying seaward of the seawall or line of permanent vegetation and within three miles seaward of the mean low water mark, and "approach" refers to property over which there exists a public right of way by title, dedication, prescription, custom, or otherwise for beach ingress and egress between the beach and the easternmost north-south roadway. All beaches and approaches within and without municipalities are included.

(Res. No. 86-136, Amend. No. 4, 9-18-86; renumbered Res. No. 96-121, Amend. No. 2, 6-20-96)

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Volusia County Code of Ordinances

ARTICLE III. MINIMUM STANDARDS FOR ENVIRONMENTAL PROTECTION

DIVISION 1. GENERALLY

Sec. 50-71. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning. Words not defined in this section shall be construed to have the meaning given by common and ordinary use as defined by Webster's New World Dictionary, Second College Edition.

* * *

Artificial light means any source of fixed or stationary light emanating from a manmade device, including, but not limited to, incandescent mercury vapor, metal halide, or sodium lamps, spotlights, streetlights, construction security lights or lights which illuminate signs.

Beach means that area of unconsolidated material that extends landward from the mean low-water line to the place where there is a marked change in material or physiographic form, or to the line of permanent vegetation (usually the effective limit of storm waves).

* * *

Coastal construction control line (CCCL) means the county coastal construction control line established by the state department of environmental protection, division of beaches and shores, to define that portion of the beach and dune system which is subject to severe fluctuations

based on a 100-year storm surge, storm-induced waves or other predictable weather conditions. This defines the area within which special siting and design considerations are required to ensure the protection of the beach dune system, proposed or existing structures, and adjacent properties, and the preservation of the public beach access.

* * *

Development means any significant manmade change, as determined by the local government, to improve or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavating, permanent storage of materials, or the dividing of land into two or more parcels. Development includes but is not limited to the following:

(1) A reconstruction, alteration of the size, or structural change in the external appearance of a structure on land.

(2) A change in the intensity of use of land, such as an increase in the number of dwelling unites in a structure or on land; or a material increase in the number of businesses, manufacturing establishments, offices, or dwelling units on the land as may be determined by the local government.

(3) Alteration of a shore or bank of a seacoast, river, stream, lake, pond, or canal, or stormwater management facilities, including any coastal construction as defined in F.S. § 161.021.

(4) Mining or excavation on a parcel of land.

(5) Demolition or removal of a structure.

(6) Clearing of land as an adjunct of construction.

(7) Deposit of refuse, solid or liquid waste, or fill on a parcel of land.

* * *

Dune means a mound or ridge of loose sediment, usually sand-sized, lying upland of the beach or shore, deposited by any natural or artificial mechanism. The term may also include a beach ridge, dune ridge, chenier or similar topographic feature.

* * *

Floodlight means a reflector-type light fixture which is attached directly to a building and which is unshielded.

* * *

Local government means any municipality in the county, and the county.

* * *

Low-profile luminaire means a light fixture set on a base which raises the source of the light no higher than 48 inches off the ground, and designed in such a way that light is directed downward from a hooded light source.

* * *

Municipality means a duly incorporated municipality in the county.

Nest means an area where sea turtle eggs have been naturally deposited or subsequently relocated.

Nesting season means the period from May 1 through October 31 of each year.

New development includes new construction and remodeling of existing structures when such remodeling includes alteration of exterior lighting.

* * *

Pole lighting means a light fixture set on base or pole which raises the source of the light higher than 48 inches off the ground.

* * *

Sea turtle means any marine turtle using the beach as a nesting habitat, and includes the species Caretta caretta (loggerhead turtle), Chelonia mydas (green turtle), Dermochelys corciacea (leatherback turtle), Eretmochelys imbricate (hawksbill turtle) and Lepidochelys kempi (Kemps turtle).

* * *

Sign means any surface, fabric, device or display that is designated to advertise, inform, identify or to attract the attention of persons. For the purpose of this article, the term "sign" shall include all structural parts.

* * *

Tinted glass means any glass treated to achieve an industry-approved, inside-to-outside light transmittance value of 45 percent of less. Such transmittance is limited to the visible spectrum (400 to 700 nanometers) and is measured as the percentage of light that is transmitted through the glass.

* * *

Sec. 50-72. Penalty.

Violations of this article are punishable as provided in section 1-7.

Sec. 50-73. Authority.

This article is authorized under article II, section 202.4, of the Charter of the county. (Ord. No. 88-15, § 100.01, 5-19-88)

Sec. 50-74. Jurisdiction.

This article shall apply in both the incorporated and unincorporated areas of the county. (Ord. No. 88-15, § 100.02, 5-19-88)

Sec. 50-75. Remedies on failure of municipality to adopt or enforce standards.

In the event a municipality does not enact or enforce the minimum standards contained in this article, the county council may bring suit in the appropriate circuit court to enjoin by mandamus any municipality to require said municipality to adopt such minimum standards for protection of the environment in conformity with article II, section 202.4 of the Charter of the county. This article may also be enforced by any other manner as provide by law.

(Ord. No. 88-15, § 100.03, 5-19-88)

Sec. 50-76. Conflicts with municipal ordinances.

In the event of a conflict between any standard, procedure, requirement or regulation established under this article by a municipal ordinance enacted by a municipality in the county, and a standard procedure, requirement or regulation established by an ordinance of the county, the county ordinance shall prevail within the municipality to the extent of any conflict.

(Ord. No. 88-15, § 100.04, 5-19-88)

Sec. 50-77. Right of municipalities to establish more restrictive standards.

The governing body of each municipality in the county may establish more restrictive standards, procedures, requirements or regulations within the municipality for any division in this article. (Ord. No. 88-15, § 100.05, 5-19-88)

* * *

DIVISION 6. SEA TURTLES*

Sec. 50-241. Definitions.

For the purpose of this division, the following words shall be defined as provided in section 50-71:

Artificial light.
Beach.

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*Cross references – Beaches, ch. 20; sea turtle protection, app. A, § 1201 et seq.

State law reference – Marine Turtle Protection Act, F.S. § 370.12.

Coastal construction control line (CCCL).
Development.
Dune.
Floodlight.
Local government.
Low-profile luminaire.
Municipality.
Nest.
Nesting season.
New development.
Pole lighting.
Sea turtle.
Sign.
Tinted glass.

(Ord. No. 89-60, § II(600), 12-21-89; Ord. No. 95-18, § II, 5-18-95)

Cross reference – Definitions and rules of construction generally, § 1-2.

Sec. 50-242. Penalty.

Violations of this division are punishable as provided in section 1-7.

Sec. 50-243. Purpose.

The purpose of this division is to protect the threatened and endangered sea turtles which nest along the beaches of the county, and to encourage sea turtle nesting on county beaches, by minimizing the artificial light on the beaches. (Ord. No. 89-60, § II(601), 12-21-89)

Sec. 50-244. Adoption of standards by municipalities.

The governing body of each affected municipality in the county, shall, no later than six months from the amended effective date of the ordinance from which this division is derived, submit to the county council, its ordinance containing the standards in this division; provided, however, prior to this date, a municipality may elect to authorize the county to administer this division within said municipality. Thereafter, the county council shall review said ordinance for compliance with this division and, after said review, inform the municipality whether or not said municipal ordinance is in compliance with this division. If such ordinance of the municipality is not enacted or submitted six months from the effective date of this amended section or is not in compliance with this division, then, notwithstanding any provision of chapter 20, the county council may enforce said ordinance in said municipality, or may enforce this provision as provided in section 50-75.

(Ord. No. 89-60, § II(609), 12-21-89; Ord. No. 95-18, § III, 5-18-95)

Sec. 50-245. Administrative procedures for permit applications, variances and appeals.

The local government shall provide for applications, variances and appeal procedures in connection with the issuance of any permit or approval in conformity with the provisions of this division. (Ord. No. 89-60, § II(605), 12-21-89)

Sec. 50-246. Stop work orders.

A local government shall provide for issuance of a stop work order to any person found in violation of this division.

(Ord. No. 89-60, § II(607), 12-21-89)

Sec. 50-247. Punishment of violations.

A local government shall provide for the punishment of violations of this division.

(Ord. No. 89-60, § II(608), 12-21-89)

Sec. 50-248. Sea turtle nesting areas.

Except as otherwise provided in section 50-249, the following coastal areas of the county are utilized or likely to be utilized by sea turtles for nesting, and those areas include:

(1) From the Volusia/Flagler County line south to the south Ormond Beach city limits;

(2) From the south city limits of Daytona Beach Shores to north jetty of Ponce Inlet; and

(3) From the south jetty of Ponce Inlet south to the Volusia/Brevard County line.

The nesting areas described in this section are regulated as provided in this division.

(Ord. No. 89-60, § II(602), 12-21-89)

Sec. 50-249. Lighting standards for new development.

(a) It is the policy of the county to minimize artificial light illuminating the entire coastal beach of the county, and said lighting for new development shall be regulated as provided in this section. To meet this intent, building and electrical plans for construction of single-family or multi-family dwellings, signs, commercial or other structures, including electrical plans associated with parking lots, dune walkovers or other outdoor lighting for real property adjoining or abutting the beach, shall be in compliance with the following:

(1) Floodlights shall be shielded, and wall-mounted light fixtures shall be fitted with hoods so that no light illuminates the beach.

(2) Pole lighting shall be shielded in such a way that light will be contained within an arc of three to 73 degrees on the seaward side of the pole.

(3) Low-profile luminaires shall be used in parking lots, and such lighting shall be positioned so that no light illuminates the beach.

(4) Dune crosswalks shall utilize low-profile shielded illuminaires.

(5) Lights illuminating buildings or associated grounds for decorative or recreational purposes shall be shielded or screened such that they do not illuminate the beach, or turned off from 8:30 p.m. each night until sunrise each morning during the sea turtle nesting season.

(6) Temporary security lights at construction sites shall not be mounted more than 15 feet above the ground. Illumination from the lights shall in no case illuminate the beach.

(7) Tinted glass, or any window film applied to window glass which meet the shading criteria for tinted glass, shall be installed on all windows of single- or multi-story structures within line of sight of the beach.

(8) Lights illuminating signs shall be shielded or screened such that they do not illuminate the beach or, be turned off from 8:30 p.m. each night until sunrise each morning during the sea turtle nesting season.

(b) The provisions of this section shall not apply to any structure for which a building permit has been issued prior to the amended date of municipal submittal as provided in section 50-244.

(Ord. No. 89-60, § II(603), 12-21-89; Ord. No. 95-18, § IV, 5-18-95)

Sec. 50-250. Lighting standards for existing development.

It is the policy of the county council to minimize artificial light illuminating any sea turtle nesting area as described in section 50-248. To meet this intent, exterior lighting of existing structures or signs which illuminate said nesting area shall be in compliance with the following by July 1, 1990:

(1) Lights illuminating buildings or associated grounds for decorative or recreational purposes shall be shielded or screened such that they do not illuminate the beach, or turned off from 8:30 p.m. each night until sunrise each morning during the nesting season.

(2) Lights illuminating dune crosswalks of any area oceanward of the dune line shall be turned off

after 8:30 p.m. each night until sunrise each morning during the nesting season.

(3) Security lighting shall be permitted throughout the night so long as low-profile luminaires are used and screened in such a way that those lights do not illuminate the beach.

(4) Lights illuminating signs shall be shielded or screened such that they do not illuminate the beach or, be turned off from 8:30 p.m. each night until sunrise each morning during the sea turtle nesting season.

(Ord. No. 89-60, § II(604), 12-21-89; Ord. No. 95-18, § V, 5-18-95)

Sec. 50-251. Publicly owned lighting.

Streetlights and lighting at parks and other publicly owned beach access areas located in the nesting area described in section 50-248 shall be subject to the following:

(1) Whenever possible, streetlights shall be located so that they will not illuminate the beach.

(2) Lights at parks or other public beach access points shall be shielded or shaded or shall not be utilized during the nesting season of each year or turned off from 8:30 p.m. each night until sunrise each morning.

(Ord. No. 89-60, § II(606), 12-21-89; Ord. No. 95-18, § VI, 5-18-95)

Sec. 50-252. Method of enforcement.

One method of enforcement which may be employed to determine whether signs or lights artificially illuminate

the beach is whether or not a human being standing on the beach casts a shadow. (Ord. No. 95-18, § VII, 5-18-95)

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA. ORLANDO DIVISION.

CASE NO.: 95-587-CIV-ORL-22

DIVISION:

LOGGERHEAD TURTLE (*Caretta caretta*), GREEN TURTLE (*Chelonia mydas*), SHIRLEY REYNOLDS and RITA ALEXANDER,

Plaintiffs,

vs.

THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, SHIRLEY REYNOLDS and RITA ALEXANDER, seek declaratory and injunctive relief against Defendant, THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida (hereinafter referred to as "Volusia County Council"), and state as follows:

PRELIMINARY STATEMENT

1. The loggerhead turtle (*Caretta caretta*) is listed as threatened under the Endangered Species Act ("the Act")

16 U.S.C. §§ 1531-1543. 50 C.F.R. § 17.11 (1994). The green turtle (*Chelonia mydas*) is listed as endangered under the Act. 50 C.F.R. § 17.11 (1994). Both the loggerhead and green turtle ("sea turtles") nest throughout Volusia County beaches. Sea turtle nesting season annually extends on Volusia County beaches from May 1st through October 31st. During the 1993 nesting season 337 loggerhead nests and 1 green turtle nest were documented on Volusia County beaches (excluding Canaveral National Seashore and North Peninsula State Recreation Area). (See Exhibit "A"). During the 1994 nesting season 490 loggerhead nests and 5 green turtle nests were documented on Volusia County beaches (excluding Canaveral National Seashore and North Peninsula State Recreation Area). (See Exhibit "A").

2. This action is a citizen suit seeking declaratory and injunctive relief to protect sea turtles that nest and hatch on Volusia County beaches. For several years, Defendant, Volusia County Council, has known of the destructive impacts of beach driving and artificial lighting on sea turtles. Defendant's refusal to ban beach driving during sea turtle nesting season and ban beachfront artificial light sources that adversely impact sea turtles violates the Act. Such actions result in the illegal "taking" of sea turtles and are subject to injunction by this Court. 16 U.S.C. § 1538(a)(1)(B).

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over the claims set forth in this Complaint under 16 U.S.C.

§ 1540(c) and (g) (the Act) and 28 U.S.C. § 2202 (injunctive relief).

4. On March 23, 1995, Plaintiffs gave written notice of their intent to bring suit against Defendant for violating the Act to Defendant and the Department of Interior, in compliance with the requirements of 16 U.S.C. § 1540(g)(2)(A)(i). A copy of this written notice of intent to sue is attached to this Complaint as Exhibit "B".

5. Venue is proper in this district pursuant to 16 U.S.C. § 1540(g)(3)(A), because the source of the violation complained of is within this district.

PARTIES

6. Shirley Reynolds has been a resident of Volusia County for 27 years. Since 1990 Ms. Reynolds has continuously lobbied for greater protection of loggerhead and green turtles in Volusia County. She is a founder of the Oceanside Neighborhood Watch, an organization that seeks to protect the quality of life among beachside residents of New Smyrna Beach, and a member of its Environmental Committee, which is dedicated to sea turtle protection and other environmental issues. During sea turtle nesting season Ms. Reynolds daily surveys a two mile stretch in New Symrna Beach documenting hazards to sea turtles.

7. Rita Alexander has been a resident of Volusia County for 16 years. Ms. Alexander has been actively involved in the protection of loggerhead and green turtles in Volusia County for many years. From 1988 through 1991 she was an employee of Greenpeace. From 1986

through the present she has held a Marine Turtle permit issued by the Florida Department of Environmental Protection. This permit has allowed Ms. Alexander to conduct sea turtle stranding and salvage activities, conduct nesting surveys, and relocate sea turtle nests.

8. Plaintiffs are "persons" within the definition of 16 U.S.C. § 1532(13).

9. Plaintiffs derive scientific, recreational, and aesthetic benefit and enjoyment from the existence of sea turtles. The actions of Defendant adversely affect Plaintiffs' opportunities to observe, study, and enjoy the sea turtles on Volusia County beaches.

10. The Volusia County Council is the legislative decision making body of Volusia County, Florida. The Volusia County Council members are sued in their official capacity.

STATEMENT OF THE CASE

11. The Endangered Species Act was enacted because Congress found that various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern for conservation, and because other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction. Congress found that these species of wildlife are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people. 16 U.S.C. § 1531(a).

12. In enacting the Endangered Species Act, Congress declared that the purposes of the Act are to provide a means whereby the ecosystems upon which endangered species depend may be conserved, and to provide a program for the conservation of such endangered and threatened species. 16 U.S.C. § 1531(b).

13. It is a violation of the Act to "take" an endangered or threatened species. 16 U.S.C. § 1538(a)(1)(B).

14. The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

15. The term "harm" refers to an act which kills or injures wildlife, including an act which causes significant habitat modification or degradation which kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering. Harm can also result from habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns. 50 C.F.R. § 17.3 (1994).

16. The loggerhead turtle (*Caretta caretta*) is a federally listed threatened species. The green turtle (*Chelonia mydas*) is a federally listed endangered species. Both species are therefore subject to full protection under the Act. 50 C.F.R. § 17.11 (1994), 16 U.S.C. § 1538(a).

17. Vehicular beach driving and artificial light sources provide very specific dangers to nesting, incubating, and hatching loggerhead and green turtles and result in the illegal "take" of loggerhead and green turtles.

18. In 1990 the Department of the Interior ("Interior") and the Department of Commerce ("Commerce") jointly issued the *Recovery Plan for U.S. Population of Loggerhead Turtle, (Caretta caretta* ("Loggerhead Recovery Plan"), which is attached as Exhibit "C". In 1991 Interior and Commerce jointly issued the *Recovery Plan for U.S. Population of Atlantic Green Turtle, (Chelonia mydas)* ("Green Turtle Recovery Plan"), which is attached as Exhibit "D". Both reports provide the same assessment of the negative impacts of beach driving on the loggerhead and green turtle:

> *Beach Vehicular Driving* – The operation of motor vehicles on nesting beaches for recreational purposes is permitted in northeast Florida (portions of Nassau, Duval, St. John's, Flagler, and Volusia counties), northwest Florida (Walton and Gulf counties), and North Carolina (Emerald Isle, Cape Lookout National Seashore, Cape Hatteras National Seashore, and Currituck Banks). While some areas restrict night driving, others permit it. Driving on beaches at night during the nesting season can disrupt the nesting process and result in aborted nesting attempts. The negative impact on nesting females in the surf zone may be particularly severe. Vehicle headlights can disorient emergent hatchlings and strike and kill hatchlings attempting to reach the ocean. The tracks or ruts left by vehicles traversing the beach interfere with the ability of hatchlings to reach the ocean. The extended period of travel required to negotiate tire tracks and ruts may increase the susceptibility of hatchlings to stress and depredation during transit to the ocean (Hosier *et al.*, 1981; M. Evans, pers. comm.). Driving directly above incubating egg clutches

> can cause sand compaction which may decrease nest success and directly kill pre-emergent hatchlings (Mann, 1977). In many areas, beach vehicular driving is the sole cause for nest relocation. Additionally, vehicle traffic on nesting beaches contributes to erosion, especially during high tides or on narrow beaches where driving is concentrated on the high beach and foredune. (See Exhibit "C" at Page 8, Exhibit "D" at Page 6).

19. Vehicular traffic on Volusia County beaches results in the illegal "take" of loggerhead and green turtles in all of the following ways:

a) Vehicles on the beach disrupt the sea turtle nesting process and result in aborted nesting attempts, known as false crawls. (See Exhibits "C", "D", "E", & "F").

b) Beach vehicular traffic has resulted for many years in nest relocations in Volusia County. Relocation is detrimental to incubating eggs and, according to the Loggerhead Recovery Plan, " . . . is not an acceptable permanent solution to vehicular traffic." (See Loggerhead Recovery Plan, Exhibit "C" at Page 30). The Volusia Turtle Patrol documented that in 1994 twelve (12) sea turtle nests were relocated on Volusia County beaches from the Flagler County line south to Ponce Inlet because of vehicular traffic. A copy of the Volusia Turtle Patrol's 1994 Nest Relocations chart is attached as Exhibit "G", and an affidavit in support of the chart is attached as Exhibit "H"). (See also Exhibit "I"). In January 1995 the Florida Department of Environmental Protection issued guidelines for marine turtle permit holders specifying

that sea turtle nests are not to be relocated despite the threats created by beach driving. (See Exhibit "J").

c) Beach vehicular traffic creates deep ruts in the dry, soft sand, disrupting a hatchling's ability to immediately reach the ocean after emerging from a nest. On a smooth beach the surf is visible and hatchlings travel directly toward the ocean. Hatchlings approaching a tire rut will travel along the barrier until a low point is reached. Hatchlings attempting to climb steep-sided impediments keel over and lay inverted. The extended period of travel required to reach the surf increases the hatchlings susceptibility to stress, predation, and desiccation. (See Exhibits "A", "C", "D", & "K").

d) Beach vehicular traffic destroys sea turtle nests. Vehicle wheels pushing through the dry, soft sand crush nests. Run over nests that are not crushed by the weight and pressure of tires are compacted. The compaction of a nest removes air pockets in the egg chamber that are essential to proper development of turtle embryos. Furthermore, displacement of sand by vehicle tires exposes eggs to the elements and predators, thereby increasing egg mortality. Moreover, prior to emergence, hatchlings make their way up toward the surface in a large group. The hatchlings may remain just below the surface of the sand for several days until environmental conditions triggering emergence are met. During this period hatchlings are particularly vulnerable to any activities which cause compaction or disturbance of the sand above them. The impacts of vehicular traffic on such nests results in high hatchling mortality and/or causes hatchlings to emerge before they are ready. (See Exhibits "A", "C", "D", & "E").

e) Vehicles on the beach can hit nesting sea turtles. (See Exhibits "C", "D", & "E").

f) Beach vehicular traffic destroys loggerhead and green turtle habitat. Driving on beaches during high tide forces vehicles up into the soft sand and dunes and destroys dune vegetation. Destruction of the dunes and vegetation leads to erosion and a diminishment of the overall quality of the nesting beach and loss of suitable nesting habitat. Beach driving and parking in the foredunes, dunes, and soft sand due to high tides is common on Volusia County beaches. (See Exhibits "A", "C", "D", & "E").

20. The *Loggerhead Recovery Plan* and *Green Turtle Recovery Plan* also assess the negative impacts of artificial lighting on the loggerhead and green turtle:

> **Artificial Lighting**: Extensive research has demonstrated that the principal component of the sea finding behavior of emergent hatchlings is a visual response to light (Daniel and Smith, 1947; Hendrickson, 1958; Carr and Ogren, 1960; Ehrenfeld and Carr, 1967; Dickerson and Nelson, 1989; Witherington and Bjorndal, 1991). Artificial beachfront lighting from buildings, streetlights, dune crossovers, vehicles and other types of beachfront lights have been documented in the disorientation (loss of bearings) and misorientation (incorrect orientation) of hatchling turtles (McFarlane, 1963; Philibosian, 1976; Mann, 1977; Ehrhart, 1983).
>
> The results of disorientation or misorientation are often fatal. As hatchlings head toward lights or meander along the beach their exposure to predators and likelihood of desiccation

is greatly increased. Misoriented hatchlings can become entrapped in vegetation or debris, and many hatchlings are found dead on nearby roadways and in parking lots after being struck by vehicles. Hatchlings that successfully find the water may be misoriented after entering the surf zone or while in nearshore waters. Intense artificial lighting can even draw hatchlings back out of the surf (Daniel and Smith, 1947; Carr and Ogren, 1960). During the period 1989 to 1990, 37,159 misoriented hatchlings were reported to the Florida Department of Natural Resources. Undoubtedly a large but unquantifiable number of additional misorientation events occurred but were not documented due to obliteration of observable sign, depredation, entrapment in thick vegetation, loss in storm drains or obliteration of carcasses by vehicle tires.

The problem of artificial beachfront lighting is not restricted to hatchlings. Raymond (1984) indicated that adult loggerhead emergence patterns were correlated with variations in beachfront lighting in south Brevard County, Florida, and that nesting females avoided areas where beachfront lights were the most intense. Witherington (1986) noted that loggerheads aborted nesting attempts at a greater frequency in lighted areas. Problem lights may not be restricted to those placed directly on or in close proximity to nesting beaches. The background glow associated with intensive inland lighting, such as that emanating from nearby large metropolitan areas, may deter nesting females and disorient or misorient hatchlings navigating the nearshore waters. Cumulatively, along the heavily developed beaches of the southeastern United States, the negative effect of artificial

lights are profound. (See Logger head Recovery Plan, Exhibit "C" and Pages 6 & 7, Green Turtle Recovery Plan, Exhibit "D" at Pages 4 & 5).

Both the Loggerhead Recovery Plan and Green Turtle Recovery Plan provide recovery goals. These goals include Implementation and enforcement of lighting ordinances prosecution of entities responsible for hatchling misorientations and elimination of vehicular traffic during sea turtle nesting season (Loggerhead Recovery Plan, Exhibit "C" at Pages 29 & 30, Green Turtle Recovery Plan, Exhibit "D" at Pages 22 & 23).

21. Artificial light sources adversely impact and illegally "take" loggerhead and green turtles in at least three (3) ways:

a) A nesting turtle emerging from the sea is likely to turn back and abort the nesting attempt due to artificial light sources visible on the beach (aborted nest attempts are known as false crawls). (See Exhibit "L"). In 1994 the Volusia Turtle Patrol documented fifty-five (55) false crawls and forty (40) nests in Daytona Beach and Daytona Beach Shores. These municipalities have no restrictions on beachfront artificial lighting. The locations of 1994 false crawls and nests in Daytona Beach and Daytona Beach Shores is attached as Exhibit "M" and an affidavit in support of this data is attached as Exhibit "H". (See also Exhibit "I"). In 1994, the Volusia Turtle Patrol documented a total of 173 false crawls from Flagler Beach south to Ponce Inlet. In 1994, the Volusia Sea Turtle Protection Society documented 375 false crawls from Ponce Inlet south to Canaveral National Seashore. (See Exhibit "N").

b) See turtles that have completed their nesting are misoriented in their return to the sea by artificial light sources. (See Exhibits "A" & "O").

c) The glaring light from artificial light sources misdirects sea turtle hatchlings from proceeding directly to the ocean. Upon emergence from the nest, hatchlings proceed immediately toward the brightest light source. On an undeveloped beach, the brightest light on the beach is the surf. On developed beaches, the glaring light of artificial light sources attracts hatchlings. Hatchlings that do not enter the ocean expeditiously suffer high mortality from predation, exhaustion, and desiccation. (See Exhibits "A" & "P"). Moreover, once in the surf, hatchlings remain attracted to artificial light sources and are observed to exit the ocean and crawl back onto land toward an artificial light source. (See Exhibit "A").

d) Artificial light sources have caused nest relocations in Volusia County for years. Sea turtle experts consider the relocation of nests to be an unacceptable practice due to the detrimental effects relocation has on the incubation of eggs (See Exhibit "J"). The Volusia Turtle Patrol documented that in 1994 forty-four (44) sea turtle nests were relocated on Volusia County beaches from the Flagler County line south to Ponce Inlet because of artificial lighting. A copy of the Volusia Turtle Patrol's 1994 Nest Relocations Chart is attached as Exhibit "G" and an affidavit in support of the chart is attached as Exhibit "H". In January 1995 the Florida Department of Environmental Protection issued guidelines for marine turtle permit holders specifying that sea turtle nests are not to be relocated despite the negative impact of artificial light sources on sea turtles. (See Exhibit "J").

22. According to Marine Turtle Hatchling Disorientation Incident Reports ("incident reports") maintained by the Florida Department of Environmental Protection, there were 28 documented incidents during the 1993 and 1994 sea turtle seasons in which beach driving and artificial beachfront lighting adversely impacted sea turtles. Twenty-five incident reports were attached as exhibits to the Notice of Intent to Sue letter sent to Defendant on March 23, 1995. Subsequently, Plaintiffs obtained three (3) additional 1994 incident reports which are attached as Exhibits "Q", "R", and "S". During the 1993 season, sea turtle volunteers produced eight (8) incident reports involving myriad sea turtle hatchlings disoriented by artificial beachfront light sources. At least four (4) of these incidents include sea turtle hatchlings that died as a result of misorientation. Several incident reports state that hatchlings were picked off by predators, most commonly ghost crabs and seagulls, after becoming misoriented by artificial light sources. Sea turtle volunteers documented two (2) incidents in 1993 involving sea turtle hatchlings disoriented by tire ruts created by traffic on the dry, soft sand areas of the beach. (See Attachments to Exhibit "B").

23. Incident reports document twenty (20) incidents in 1994. Nineteen (19) involved sea turtle hatchling misorientation caused by artificial beachfront light sources. Four (4) incident reports also involve misorientation of sea turtle hatchlings caused by tire ruts created by vehicular traffic on the beach. Seven (7) incident reports document dead hatchlings found by volunteers. (See attachments to Exhibit "B". See also Exhibits "Q", "R", & "S").

24. The incident reports understate the absolute number of sea turtles disoriented, misoriented, and killed by the impacts of beach driving and artificial light sources simply because sea turtle volunteers are not omnipresent on the approximately 40 miles that comprise Volusia County beaches (excluding Canaveral National Seashore and North Peninsula State Recreation Area) during the May 1st through October 31st nesting season. Volunteers are rarely present at night when hatchlings typically emerge from their nests. Surveys are routinely conducted early in the morning, after most hatchlings have emerged. The incident reports attached to Exhibit "A" document that sea turtle volunteers typically perform their duties in the morning.

Sea turtle volunteers are rarely present at night when sea turtles emerge from the sea to deposit their eggs. Although volunteers diligently locate most nests, they do not locate every nest. Approximately 8% of sea turtle nests are missed by the most diligent, highly trained surveyors. (See Exhibit "A"). Some of the reasons that it is impossible for volunteers to locate every nest include: First, nests which are laid during a high tide may have nesting signs washed away or driven over before volunteers conduct their morning patrols; heavy rainfall during the night or early morning can obliterate tracks and other nesting signs. Also, storm tides may make it impossible for volunteers to access the entire beach to check for nests laid the night before. Even after nests are found and marked, storm tides can wash away marking stakes and ribbons, thereafter making their locations unknown. (See Exhibit "T") For example, the Volusia Turtle Patrol's 1994 Nest Relocations Chart indicates that three (3) nests were

not discovered until after the hatchlings emerged. (See Exhibit "H").

25. Plaintiffs have documented other incidents involving the illegal "take" of loggerhead and green turtles in Volusia County resulting from vehicular traffic and artificial beach front light sources not included in the 1993 and 1994 incident reports. These include:

a) September 9, 1988: Nine loggerhead hatchlings found dead in tire ruts created by Volusia County Sanitation Department vehicle. (See Exhibit "U").

b) August 11, 1993: Two sea turtle hatchlings found in tire ruts. One hatchling found dead, the other died later that day. (See Attachment 32 of Exhibit "B").

c) September 20, 1993: Forty sea turtle hatchlings misoriented by artificial light sources. (See Attachment 33 of Exhibit "B").

d) July 8, 1994: From 7:45 A.M. to 8:45 A.M. emerging loggerhead hatchlings trapped in tire ruts. (See Attachment 34 of Exhibit "B").

e) July 12, 1994: Misorientation of sea turtle hatchlings caused by artificial light sources. (See Attachment 35 of Exhibit "B").

f) July 28, 1994: Misorientation of sea turtle hatchlings caused by artificial light sources. (See Attachment 36 of Exhibit "B").

g) July 16 or 23, 1994: At 9:30 A.M. eight sea turtle hatchlings disoriented by tire ruts. One sea turtle hatchling was run over by a car and died. (See Exhibit "V").

h) August 31, 1994: A dead hatchling found on the beach at Ponce Inlet at approximately 3:45 P.M. (See Exhibits "W", "X", & "Y").

26. Defendant, Volusia County Council, is empowered by § 161.58, Florida Statutes (1993) to permit and regulate vehicular traffic on Volusia County beaches. Pursuant to that authority Defendant adopted Ordinance 87-36, known as the Volusia County Unified Beach Code ("the Beach Code"), a copy of which is attached as Exhibit "Z". Section 6, entitled "Traffic and Parking Regulations" authorizes vehicular traffic on Volusia County beaches from one hour before sunrise to one hour after sunset. Section 6.05 provides for vehicular traffic on the beach until midnight. Section 5, entitled "Regulation of Temporary use of Beach for Special Events", is intended to assure broad beach usage by allowing temporary uses of the beach for purposes which otherwise would be prohibited. Special Event permits are used to permit vehicular traffic on the beach beyond that authorized by Section 6. Under Section 6, vehicular traffic is permitted on Daytona Beach until 3:00 A.M. during sea turtle nesting season. (See Exhibit "AA").

27. Volusia County's Beach Management Plan, issued August 31, 1992, indicates that from May through September 1990, 1,010,810 motor vehicles were counted at Volusia County beach toll booths. In 1991, 967,202 motor vehicles were counted at Volusia County beach toll booths from May through September. A copy of the 1992 Beach Management Plan is attached as Exhibit "BB").

28. Defendant's continuing refusal to ban vehicular traffic during sea turtle nesting season will:

a) Adversely impact sea turtle movements on Volusia County beaches through aborted nestings (false crawls) and entrapment of hatchlings in tire ruts.

b) Adversely impact behavior activities (nesting and disbursal of hatchlings).

c) Continue the likelihood of destruction of sea turtle nests because nests in the path of traffic are no longer relocated, but merely caged.

d) Continue the likelihood of sea turtle mortality due to run over hatchlings and vehicle collisions with nesting turtles.

e) Continue the degradation of sea turtle habitat.

f) Hinder the recovery of loggerhead and green turtles. Defendant's continuing refusal to ban vehicular traffic during sea turtle nesting season in Volusia County constitutes an unlawful "taking" of loggerhead and green turtles pursuant to 16 U.S.C. § 1538(a)(1)(B).

29. In 1990, Defendant adopted Ordinance 90-22, which provides for the regulation of beach-front artificial lighting sources that misorient and disrupt sea turtles. A copy of Ordinance 90-22 is attached as Exhibit "CC". A copy ~~of~~ the May 1995 amendments to Ordinance 90-22 is attached as Exhibit "DD". Ordinance 90-22 excludes those portions of Volusia County beaches comprising Daytona Beach and Daytona Beach Shores. Ordinance 90-22 also excludes incorporated areas of Volusia County that adopt the Minimum Environmental Standards for Sea Turtle Protection set forth in Volusia County Ordinance 89-60, a copy of which is attached as Exhibit "EE".

30. Defendant's refusal to ban beachfront artificial light sources that adversely impact sea turtles will:

a) Continue the likelihood of sea turtle mortality due to lighting induced misorientations of hatchlings.

b) Adversely impact sea turtle movements on Volusia County beaches through aborted nestings (false crawls) and misorientations of hatchlings.

c) Hinder the recovery of loggerhead and green turtles.

Defendant's continuing refusal to ban artificial beachfront lighting that negatively impacts sea turtles constitutes an unlawful "taking" of loggerhead and green turtles pursuant to 16 U.S.C. § 1538(a)(1)(B).

31. The actions of Defendant do not fall within the exemptions to 16 U.S.C. § 1538, in that Defendant does not have an "incidental take" permit issued pursuant to 16 U.S.C. § 1539, nor is Defendant's action pursuant to 16 U.S.C. § 1535(a)(2).

IRREPARABLE AND IMMEDIATE HARM

32. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 31 above.

33. Defendant's continuing refusal to ban vehicular traffic on Volusia County beaches during sea turtle nesting season and continuing refusal to ban those artificial light sources that negatively impact sea turtles during sea turtle nesting season despite the fact of a "substantial

likelihood" of harm to loggerhead and green turtles, constitutes an irreparable threat to the recovery and continued existence of the threatened loggerhead and endangered green turtle.

34. The 1993 and 1994 documented incidents of the harm to loggerhead and green turtles posed by vehicular traffic on Volusia County beaches and Defendant's continuing refusal to ban those artificial light sources on Volusia County beaches that negatively impact sea turtles demonstrate that this threat is immediate and significant. Defendant's conduct has created an emergency posing a significant risk to the survival of the species. Plaintiffs' interests are being irreparably injured and Plaintiffs have no remedy at law.

CLAIM FOR RELIEF

35. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 31 above.

36. Defendant's continuing allowance of vehicular traffic on Volusia County beaches during sea turtle nesting season constitutes a "taking" of endangered and threatened species in violation of 16 U.S.C. § 1538(a)(1)(B).

37. Defendant's continuing refusal to eliminate those artificial light sources that misorient sea turtles on Volusia County beaches during sea turtle nesting season constitutes a "taking" of endangered and threatened species in violation of 16 U.S.C. § 1538(a)(1)(B).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that:

38. The Court declare that the allowance of vehicular traffic on Volusia County beaches, (except a limited number of vehicles necessary for public safety), annually from May 1st through October 31st constitutes an unlawful "taking" of the loggerhead and green turtle in violation of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B).

39. The Court declare that defendant's refusal to eliminate those artificial light sources that illuminate Volusia County beaches and misorient sea turtles from May 1st through October 31st annually constitutes an unlawful "taking" of the loggerhead and green turtle, in violation of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B).

40. Defendant, Volusia County Council, be permanently enjoined and restrained from permitting vehicular traffic (except a limited number of vehicles necessary for public safety) on Volusia County beaches annually from May 1st through October 31st.

41. Defendant, Volusia County Council, be permanently enjoined and restrained from permitting those artificial light sources that misorient sea turtles to illuminate Volusia County beaches annually from May 1st through October 31st.

42. The Court award such other relief as is appropriate.

43. The Court award Plaintiffs their costs, expenses, expert witness fees, attorney's fees, and any other reasonable costs of litigation.

Respectfully submitted,

PENLAND & BLOCK, P.A.

By: /s/ Lesley Blackner
Lesley Blackner
Florida Bar No.: 654403
1113 Blackstone Building
233 East Bay Street
Jacksonville, Florida 32202
Attorney for Plaintiffs
Telephone: (904) 632-2100
Facsimile: (904) 353-3756

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA. ORLANDO DIVISION.

CASE NO.: 95-587-CIV-ORL-22

DIVISION:

LOGGERHEAD TURTLE (*Caretta caretta*), GREEN TURTLE (*Chelonia mydas*), LEATHERBACK TURTLE (*Dermochelys coriacea*) SHIRLEY REYNOLDS and RITA ALEXANDER,

Plaintiffs,

vs.

THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant.

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, SHIRLEY REYNOLDS and RITA ALEXANDER, seek declaratory and injunctive relief against Defendant, THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida (hereinafter referred to as "Volusia County Council"), and state as follows:

PRELIMINARY STATEMENT

1. The loggerhead turtle (*Caretta caretta*) is listed as threatened under the Endangered Species Act ("the Act") 16 U.S.C. §§1531-1543, 50 C.F.R. §17.11 (1994). The green

turtle (*Chelonia mydas*) and leatherback turtle (*Dermochelys coriacea*) are listed as endangered under the Act. 50 C.F.R. §17.11 (1994). The loggerhead, green turtle, and leatherback ("sea turtles") nest throughout Volusia County beaches. Sea turtle nesting season officially extends on Volusia County beaches from May 1st through October 31st. However, leatherbacks begin nesting in February. During the 1993 nesting season, 337 loggerhead nests and 1 green turtle nest were documented on Volusia County beaches (excluding Canaveral National Seashore and North Peninsula State Recreation Area). (See Exhibit "A"). During the 1994 nesting season 490 loggerhead nests and 5 green turtle nests were documented on Volusia County beaches (excluding Canaveral National Seashore and North Peninsula State Recreation Area). (See Exhibit "A"). The report, "Sea Turtle Nesting Activity in the State of Florida 1979-1992", issued by the Florida Marine Research Institute in June 1995, reports that, 11 leatherback nests were laid on Volusia County beaches between 1983 and 1992. This number underrepresents the true number of leatherback nests in Volusia County because leatherbacks begin nesting as early as February, though sea turtle nesting surveys do not commence until late April or early May. (See Amended Complaint Exhibit "1").

2. This action is a citizen suit seeking declaratory and injunctive relief to protect sea turtles that nest and hatch on Volusia County beaches. For several years, Defendant, Volusia County Council, has known of the destructive impacts of beach driving and artificial lighting on sea turtles. Defendant's refusal to ban beach driving from February 1st through December 31st and ban

beachfront artificial light sources that adversely impact sea turtles violates the Act. Any protective measures currently adopted by Defendant ostensibly to protect sea turtles, are either inadequately enforced or not enforced at all. Such actions result in the illegal "taking" of sea turtles and are subject to injunction by this Court. 16 U.S.C. §1538(a)(1)(B).

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over the claims set forth in this Complaint under 16 U.S.C. §1540(c) and (g) (the Act) and 28 U.S.C. §2202 (injunctive relief).

4. On March 23, 1995, Plaintiffs gave written notice of their intent to bring suit against Defendant for violating the Act to both Defendant and the Department of Interior, in compliance with the requirements of 16 U.S.C. §1540(g)(2)(A)(i). A copy of this written notice of intent to sue is attached to this Complaint as Exhibit "B".

5. Venue is proper in this district pursuant to 16 U.S.C. §1540(g)(3)(A), because the source of the violation complained of is within this district.

PARTIES

6. Shirley Reynolds has been a resident of Volusia County for 27 years. Since 1990 Ms. Reynolds has continuously lobbied for greater protection of loggerhead, green and leatherback turtles in Volusia County. She is a founder of the Oceanside Neighborhood Watch, an organization that seeks to protect the quality of life among

beachside residents of New Smyrna Beach, and a member of its Environmental Committee, which is dedicated to sea turtle protection and other environmental issues. During sea turtle nesting season Ms. Reynolds daily surveys a two mile stretch in New Smyrna Beach documenting hazards to sea turtles.

7. Rita Alexander has been a resident of Volusia County for 16 years. Ms. Alexander has been actively involved in the protection of loggerhead, green and leatherback turtles in Volusia County for many years. From 1988 through 1991 she was an employee of Greenpeace. From 1986 through the present she has held a Marine Turtle permit issued by the Florida Department of Environmental Protection. This permit has allowed Ms. Alexander to conduct sea turtle stranding and salvage activities, conduct nesting surveys, and relocate sea turtle nests.

8. Plaintiffs are "persons" within the definition of 16 U.S.C. §1532(13).

9. Plaintiffs and other citizens derive scientific, recreational, and aesthetic benefit and enjoyment from the existence of sea turtles. The actions of Defendant adversely affect Plaintiffs' opportunities to observe, study, and enjoy the sea turtles on Volusia County beaches.

10. The Loggerhead Turtle (*Caretta caretta*), the Green Turtle (*Chelonia mydas*), and the Leatherback Turtle (*Dermochelys coriacea*), possess independent standing under the Act to bring this action.

11. The Volusia County Council is the legislative decision making body of Volusia County, Florida. The Volusia County Council members are sued in their official capacity.

STATEMENT OF THE CASE

12. The Endangered Species Act was enacted because Congress found that various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern for conservation, and because other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction. Congress found that these species of wildlife are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people. 16 U.S.C. §1531(a).

13. In enacting the Endangered Species Act, Congress declared that the purposes of the Act are to provide a means whereby the ecosystems upon which endangered species depend may be conserved, and to provide a program for the conservation of such endangered and threatened species. 16 U.S.C. §1531(b).

14. It is a violation of the Act to "take" an endangered or threatened species. 16 U.S.C. §1538(a)(1)(B).

15. The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. §1532(19).

16. The term "harm" refers to an act which kills or injures wildlife, including an act which causes significant habitat modification or degradation which kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering. Harm can also result from habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns. 50 C.F.R. §17.3 (1994).

17. The loggerhead turtle (*Caretta caretta*) is a federally listed threatened species. The green turtle (*Chelonia mydas*) and leatherback turtle (*Dermochelys coriacea*) are federally listed endangered species. All three species are therefore subject to full protection under the Act. 50 C.F.R. §17.11 (1994), 16 U.S.C. §1538(a).

18. Vehicular beach driving and artificial light sources provide very specific dangers to nesting, incubating, and hatching loggerhead, green and leatherback turtles and result in the illegal "take" of loggerhead, green and leatherback turtles.

19. In 1990 the Department of the Interior ("Interior") and the Department of Commerce ("Commerce") jointly issued the *Recovery Plan for U.S. Population of Loggerhead Turtle, (Caretta caretta)* ("Loggerhead Recovery Plan"), which is attached as Exhibit "C". In 1991 Interior and Commerce jointly issued the *Recovery Plan for U.S. Population of Atlantic Green Turtle, (Chelonia mydas)* ("Green Turtle Recovery Plan"), which is attached as Exhibit "D". In 1992 Interior and Commerce jointly issued the *Recovery Plan for Leatherback Turtles, (Dermochelys coriacea)* ("Leatherback Recovery Plan"), which is attached as

Amended Complaint Exhibit "2". All three reports provide the same assessment of the negative impacts of beach driving on sea turtles. The Loggerhead Recovery Plan and the Green Turtle Recovery Plan provide:

> *Beach Vehicular Driving* – The operation of motor vehicles on nesting beaches for recreational purposes is permitted in northeast Florida (portions of Nassau, Duval, St. John's, Flagler, and Volusia counties), northwest Florida (Walton and Gulf counties), and North Carolina (Emerald Isle, Cape Lookout National Seashore, Cape Hatteras National Seashore, and Currituck Banks). While some areas restrict night driving, others permit it. Driving on beaches at night during the nesting season can disrupt the nesting process and result in aborted nesting attempts. The negative impact on nesting females in the surf zone may be particularly severe. Vehicle headlights can disorient emergent hatchlings and strike and kill hatchlings attempting to reach the ocean. The tracks or ruts left by vehicles traversing the beach interfere with the ability of hatchlings to reach the ocean. The extended period of travel required to negotiate tire tracks and ruts may increase the susceptibility of hatchlings to stress and depredation during transit to the ocean (Hosier *et al.*, 1981; M. Evans, pers. comm.). Driving directly above incubating egg clutches can cause sand compaction which may decrease nest success and directly kill pre-emergent hatchlings (Mann, 1977). In many areas, beach vehicular driving is the sole cause for nest relocation. Additionally, vehicle traffic on nesting beaches contributes to erosion, especially during high tides or on narrow beaches where driving is concentrated on the high beach and

foredune. (See Exhibit "C" at Page 8, Exhibit "D" at Page 6).

The Leatherback Recovery Plan provides:

> Beach Vehicular Driving: Beaches are often times viewed as a playground for off-road vehicles (ATV's 4x4's, motorcycles). This may decrease hatchling success due to sand compaction (Mann, 1977) or directly kill pre-emergent hatchlings as happened on Sandy Point NWR in 1984 with at least one nest. Vehicles can also strike and kill hatchlings while they are crawling to the ocean. Vehicle tire ruts also interfere with the ability of hatchlings to traverse the beach to the ocean (Hosier, et al., 1981). On some beaches this is a serious problem. Beaches with limited access (eg. Culebra, Buck Island) have little or no problem of this sort. On other beaches however, this may be a serious problem (e.g. Sandy Point NWR, Basford et al., 1988; Mandahl and Caret Bays, St. Thomas; Bureau of Environmental Enforcement Officers, pers. comm.; Manchenil Bay, St. Croix, Adams, 1988; and northeastern Puerto Rico, P.J.R. Lugo, H.C. Horta, pers. comm.) In both the USVI and Puerto Rico this activity is illegal, yet it persists. In Florida beach driving is permitted in portions of Nassau, St. John's, Flagler and Volusia Counties along the east coast. Night driving is permitted within some of these areas. This can disturb nesting sea turtles and result in aborted nesting attempts. (See Amended Complaint Exhibit "2" at Page 14).

20. Vehicular traffic on Volusia County beaches results in the illegal "take" of sea turtles in all of the following ways:

a) Vehicles on the beach disrupt the sea turtle nesting process and result in aborted nesting attempts, known as false crawls. (See Exhibits "C", "D", "E", & "F").

b) Beach vehicular traffic has resulted for many years in nest relocations in Volusia County. Relocation is detrimental to incubating eggs and, according to the Loggerhead Recovery Plan, " . . . is not an acceptable permanent solution to vehicular traffic." (See Loggerhead Recovery Plan, Exhibit "C" at Page 30). The Volusia Turtle Patrol documented that in 1994 twelve (12) sea turtle nests were relocated on Volusia County beaches from the Flagler County line south to Ponce Inlet because of vehicular traffic. A copy of the Volusia Turtle Patrol's 1994 Nest Relocations chart is attached as Exhibit "G", and an affidavit in support of the chart is attached as Exhibit "H"). (See also Exhibit "I"). In January 1995 the Florida Department of Environmental Protection issued guidelines for marine turtle permit holders specifying that sea turtle nests are not to be relocated despite the threats created by beach driving. (See Exhibit "J").

c) Beach vehicular traffic creates deep ruts in the dry, soft sand, disrupting a hatchling's ability to immediately reach the ocean after emerging from a nest. On a smooth beach the surf is visible and hatchlings travel directly toward the ocean. Hatchlings approaching a tire rut will travel along the barrier until a low point is reached. Hatchlings attempting to climb steep-sided impediments keel over and lay inverted. The extended period of travel required to reach the surf increases the hatchlings susceptibility to stress, predation, and desiccation. (See Exhibits "A", "C", "D", & "K").

d) Beach vehicular traffic destroys sea turtle nests. Vehicle wheels pushing through the dry, soft sand crush nests. Run over nests that are not crushed by the weight and pressure of tires are compacted. The compaction of a nest removes air pockets in the egg chamber that are essential to proper development of turtle embryos. Furthermore, displacement of sand by vehicle tires exposes eggs to the elements and predators, thereby increasing egg mortality. Moreover, prior to emergence, hatchlings make their way up toward the surface in a large group. The hatchlings may remain just below the surface of the sand for several days until environmental conditions triggering emergence are met. During this period hatchlings are particularly vulnerable to any activities which cause compaction or disturbance of the sand above them. The impacts of vehicular traffic on such nests results in high hatchling mortality and/or causes hatchlings to emerge before they are ready. (See Exhibits "A", "C", "D", & "E").

e) Vehicles on the beach can hit nesting sea turtles. (See Exhibits "C", "D", & "E").

f) Vehicular traffic poses a grave threat to post-hatchling sea turtles, aged one week to approximately three months, which are washed ashore by storm activity during the nesting season and the months of November and December. Washed-back post-hatchlings are gathered by sea turtle permit holders and released at sea. Washed-back hatchlings can be run over by vehicular traffic.

g) Beach vehicular traffic destroys loggerhead, green and leatherback turtle habitat. Driving on beaches during high tide forces vehicles up into the soft sand and

dunes and destroys dune vegetation. Destruction of the dunes and vegetation leads to erosion and a diminishment of the overall quality of the nesting beach and loss of suitable nesting habitat. Beach driving and parking in the foredunes, dunes, and soft sand due to high tides is common on Volusia County beaches. (See Exhibits "A", "C", "D", & "E").

21. The *Loggerhead Recovery Plan, Green Turtle Recovery Plan* and *Leatherback Recovery Plan* also assess the negative impacts of artificial lighting on the loggerhead and green turtle:

> Artificial Lighting: Extensive research has demonstrated that the principal component of the sea finding behavior of emergent hatchlings is a visual response to light (Daniel and Smith, 1947; Hendrickson, 1958; Carr and Ogren, 1960; Ehrenfeld and Carr, 1967; Dickerson and Nelson, 1989; Witherington and Bjorndal, 1991). Artificial beachfront lighting from buildings, streetlights, dune crossovers, vehicles and other types of beachfront lights have been documented in the disorientation (loss of bearings) and misorientation (incorrect orientation) of hatchling turtles (McFarlane, 1963; Philibosian, 1976; Mann, 1977; Ehrhart, 1983).
>
> The results of disorientation or misorientation are often fatal. As hatchlings head toward lights or meander along the beach their exposure to predators and likelihood of desiccation is greatly increased. Misoriented hatchlings can become entrapped in vegetation or debris, and many hatchlings are found dead on nearby roadways and in parking lots after being struck by vehicles. Hatchlings that successfully find

the water may be misoriented after entering the surf zone or while in nearshore waters. Intense artificial lighting can even draw hatchlings back out of the surf (Daniel and Smith, 1947; Carr and Ogren, 1960). During the period 1989 to 1990, 37,159 misoriented hatchlings were reported to the Florida Department of Natural Resources. Undoubtedly a large but unquantifiable number of additional misorientation events occurred but were not documented due to obliteration of observable sign, depredation, entrapment in thick vegetation, loss in storm drains or obliteration of carcasses by vehicle tires.

The problem of artificial beachfront lighting is not restricted to hatchlings. Raymond (1984) indicated that adult loggerhead emergence patterns were correlated with variations in beachfront lighting in south Brevard County, Florida, and that nesting females avoided areas where beachfront lights were the most intense. Witherington (1986) noted that loggerheads aborted nesting attempts at a greater frequency in lighted areas. Problem lights may not be restricted to those places directly on or in close proximity to nesting beaches. The background glow associated with intensive inland lighting, such as that emanating from nearby large metropolitan areas, may deter nesting females and disorient or misorient hatchlings navigating the nearshore waters. Cumulatively, along the heavily developed beaches of the southeastern United States, the negative effects of artificial lights are profound. (See Loggerhead Recovery Plan, Exhibit "C" and Pages 6 & 7, Green Turtle Recovery Plan, Exhibit "D" at Pages 4 & 5). See also Leatherback Recovery Plan, Amended Complaint Exhibit "2" at 12 & 13.

The Loggerhead Recovery Plan, Green Turtle Recovery Plan and Leatherback Recovery Plan provide recovery goals. These goals include implementation and enforcement of lighting ordinances, prosecution of entities responsible for hatchling misorientations and elimination of vehicular traffic during sea turtle nesting season (Loggerhead Recovery Plan, Exhibit "C" at Pages 29 & 30, Green Turtle Recovery Plan, Exhibit "D" at Pages 22 & 23, Leatherback Recovery Plan, Amended Complaint Exhibit "2" at 24 & 25.

22. Artificial light sources adversely impact and illegally "take" loggerhead, green and leatherback turtles in at least three (3) ways:

a) A nesting turtle emerging from the sea is likely to turn back and abort the nesting attempt due to artificial light sources visible on the beach (aborted nest attempts are known as false crawls). (See Exhibit "L"). In 1994 the Volusia Turtle Patrol documented fifty-five (55) false crawls and forty (40) nests in Daytona Beach and Daytona Beach Shores. These municipalities have no restrictions on beachfront artificial lighting. The locations of 1994 false crawls and nests in Daytona Beach and Daytona Beach Shores is attached as Exhibit "M" and an affidavit in support of this data is attached as Exhibit "H". (See also Exhibit "I"). In 1994, the Volusia Turtle Patrol documented a total of 173 false crawls from Flagler Beach south to Ponce Inlet. In 1994, the Volusia Sea Turtle Protection Society documented 375 false crawls from Ponce Inlet south to Canaveral National Seashore. (See Exhibit "N").

b) Sea turtles that have completed their nesting are misoriented in their return to the sea by artificial light sources. (See Exhibits "A" & "O").

c) The glaring light from artificial light sources misdirects sea turtle hatchlings from proceeding directly to the ocean. Upon emergence from the nest, hatchlings proceed immediately toward the brightest light source. On an undeveloped beach, the brightest light on the beach is the surf. On developed beaches, the glaring light of artificial light sources attracts hatchlings. Hatchlings that do not enter the ocean expeditiously suffer high mortality from predation, exhaustion, and desiccation. (See Exhibits "A" & "P"). Moreover, once in the surf, hatchlings remain attracted to artificial light sources and are observed to exit the ocean and crawl back onto land toward an artificial light source. (See Exhibit "A").

d) Artificial light sources have caused nest relocations in Volusia County for years. Sea turtle experts consider the relocation of nests to be an unacceptable practice due to the detrimental effects relocation has on the incubation of eggs (See Exhibit "J"). The Volusia Turtle Patrol documented that in 1994 forty-four (44) sea turtle nests were relocated on Volusia County beaches from the Flagler County line south to Ponce Inlet because of artificial lighting. A copy of the Volusia Turtle Patrol's 1994 Nest Relocation Chart is attached as Exhibit "G" and an affidavit in support of the chart is attached as Exhibit "H". In January 1995 the Florida Department of Environmental Protection issued guidelines for marine turtle permit holders specifying that sea turtle nests are not to be relocated despite the negative impact of artificial light sources on sea turtles. (See Exhibit "J").

23. According to Marine Turtle Hatchling Disorientation Incident Reports ("incident reports") maintained by the Florida Department of Environmental Protection, there were 28 documented incidents during the 1993 and 1994 sea turtle seasons in which beach driving and artificial beachfront lighting adversely impacted sea turtles. Twenty-five incident reports were attached as exhibits to the Notice of Intent to Sue letter sent to Defendant on March 23, 1995. Subsequently, Plaintiffs obtained three (3) additional 1994 incident reports which are attached as Exhibits "Q", "R", and "S". During the 1993 season, sea turtle volunteers produced eight (8) incident reports involving myriad sea turtle hatchlings disoriented by artificial beachfront light sources. At least four (4) of these incidents include sea turtle hatchlings that died as a result of misorientation. Several incident reports state that hatchlings were picked off by predators, most commonly ghost crabs and seagulls, after becoming misoriented by artificial light sources. Sea turtle volunteers documented two (2) incidents in 1993 involving sea turtle hatchlings disoriented by tire ruts created by traffic on the dry, soft sand areas of the beach. (See Attachments to Exhibit "B").

24. Incident reports document twenty (20) incidents in 1994. Nineteen (19) involved sea turtle hatchling misorientation caused by artificial beachfront light sources. Four (4) incident reports also involve misorientation of sea turtle hatchlings caused by tire ruts created by vehicular traffic on the beach. Seven (7) incident reports document dead hatchlings found by volunteers. (See attachments to Exhibit "B". See also Exhibits "Q", "R", & "S").

25. The incident reports understate the absolute number of sea turtles disoriented, misoriented, and killed by the impacts of beach driving and artificial light sources simply because sea turtle volunteers are not omnipresent on the approximately 40 miles that comprise Volusia County beaches (excluding Canaveral National Seashore and North Peninsula State Recreation Area) during the May 1st through October 31st, when nesting surveys are conducted daily. Volunteers are rarely present at night when hatchlings typically emerge from their nests. Surveys are routinely conducted early in the morning, after most hatchlings have emerged. The incident reports attached to Exhibit "A" document that sea turtle volunteers typically perform their duties in the morning.

Sea turtle volunteers are rarely present at night when sea turtles emerge from the sea to deposit their eggs. Although volunteers diligently locate most nests, they do not locate every nest. Approximately 8% of sea turtle nests are missed by the most diligent, highly trained surveyors. (See Exhibit "A"). Some of the reasons that it is impossible for volunteers to locate every nest include: First, nests which are laid during a high tide may have nesting signs washed away or driven over before volunteers conduct their morning patrols; heavy rainfall during the night or early morning can obliterate tracks and other nesting signs. Also, storm tides may make it impossible for volunteers to access the entire beach to check for nests laid the night before. Even after nests are found and marked, storm tides can wash away marking stakes and ribbons, thereafter making their locations unknown. (See Exhibit "T"). For example, the Volusia Turtle Patrol's 1994 Nest Relocations Chart indicates that three (3) nests were

not discovered until after the hatchlings emerged. (See Exhibit "H").

Data underrepresents the presence of leatherbacks and harm to leatherbacks because leatherbacks begin nesting in February and surveys are not conducted until May.

26. Plaintiffs have documented other incidents involving the illegal "take" of sea turtles in Volusia County resulting from vehicular traffic and artificial beach front light sources not included in the 1993 and 1994 incident reports. These include:

a) September 9, 1988: Nine loggerhead hatchlings found dead in tire ruts created by Volusia County Sanitation Department vehicle. (See Exhibit "U").

b) August 11, 1993: Two sea turtle hatchlings found in tire ruts. One hatchling found dead, the other died later that day. (See Attachment 32 of Exhibit "B").

c) September 20, 1993: Forty sea turtle hatchlings misoriented by artificial light sources. (See Attachment 33 of Exhibit "B").

d) July 8, 1994: From 7:45 A.M. to 8:45 A.M. emerging loggerhead hatchlings trapped in tire ruts. (See attachment 34 of Exhibit "B").

e) July 12, 1994: Misorientation of sea turtle hatchlings caused by artificial light sources. (See Attachment 35 of Exhibit "B").

f) July 28, 1994: Misorientation of sea turtle hatchlings caused by artificial light sources. (See Attachment 36 of Exhibit "B").

g) July 16 or 23, 1994: At 9:30 A.M. eight sea turtle hatchlings disoriented by tire ruts. One sea turtle hatchling was run over by a car and died. (See Exhibit "V").

h) August 31, 1994: A dead hatchling found on the beach at Ponce Inlet at approximately 3:45 P.M. (See Exhibits "W", "X", & "Y").

27. Defendant, Volusia County Council, is empowered by §161.58, Florida Statutes (1993) to permit and regulate vehicular traffic on Volusia County beaches. Pursuant to that authority Defendant adopted Ordinance 87-36, known as the Volusia County Unified Beach Code ("the Beach Code"), a copy of which is attached as Exhibit "Z". Section 6, entitled "Traffic and Parking Regulations" authorizes vehicular traffic on Volusia County beaches from one hour before sunrise to one hour after sunset. Section 6.05 provides for vehicular traffic on the beach until midnight. Section 5, entitled "Regulation of Temporary use of Beach for Special Events", is intended to assure broad beach usage by allowing temporary uses of the beach for purposes which otherwise would be prohibited. Special Event permits are used to permit vehicular traffic on the beach beyond that authorized by Section 6. Under Section 6, vehicular traffic is permitted on Daytona Beach until 3:00 A.M. (See Exhibit "AA").

28. Volusia County's Beach Management Plan, issued August 31, 1992, indicates that from May through September 1990, 1,010,810 motor vehicles were counted at Volusia County beach tool booths. In 1991, 967,202 motor vehicles were counted at Volusia County beach tool booths from May through September. A copy of the 1992 Beach Management Plan is attached as Exhibit "BB".

29. Defendant's continuing refusal to ban vehicular traffic on Volusia county beaches from February 1st through December 31st will:

a) Adversely impact sea turtle movements on Volusia County beaches through aborted nestings (false crawls) and entrapment of hatchlings in tire ruts.

b) Adversely impact behavioral activities (nesting and disbursal of hatchlings).

c) Continue the likelihood of destruction of sea turtle nests because nests in the path of traffic are no longer relocated, but merely caged.

d) Continue the likelihood of sea turtle mortality due to run over hatchlings, washed backed turtles and vehicle collisions with nesting turtles.

e) Continue the degradation of sea turtle habitat.

f) Hinder the recovery of loggerhead, green turtles and leatherback sea turtles.

Defendant's continuing refusal to ban vehicular beach traffic from February 1st through December 31st constitutes an unlawful "taking" of loggerhead, green and leatherback turtles pursuant to 16 U.S.C. §1538(a)(1)(B).

30. In 1990, Defendant adopted Ordinance 90-22, which provides for the regulation of beach-front artificial lighting sources that misorient and disrupt sea turtles. A copy of Ordinance 90-22 is attached as Exhibit "CC". A copy of the May 1995 amendments to Ordinance 90-22 is attached as Exhibit "DD". Ordinance 90-22 excludes those portions of Volusia County beaches comprising Daytona Beach and Daytona Beach Shores. Ordinance 90-22 also

excludes incorporated areas of Volusia County that adopt the Minimum Environmental Standards for Sea Turtle Protection set forth in Volusia County Ordinance 89-60, a copy of which is attached as Exhibit "EE".

31. Defendant's refusal to ban beachfront artificial light sources that adversely impact sea turtles will:

a) Continue the likelihood of sea turtle mortality due to lighting induced misorientations of hatchlings.

b) Adversely impact sea turtle movements on Volusia County beaches through aborted nestings (false crawls) and misorientations of hatchlings.

c) Hinder the recovery of loggerhead, green and leatherback turtles.

Defendant's continuing refusal to ban artificial beachfront lighting that negatively impacts sea turtles constitutes an unlawful "taking" of loggerhead, green and leatherback turtles pursuant to 16 U.S.C. §1538(a)(1)(B).

32. The actions of Defendant do not fall within the exemptions of 16 U.S.C. §1538, in that Defendant does not have an "incidental take" permit issued pursuant to 16 U.S.C. §1539, nor is Defendant's action pursuant to 16 U.S.C. §1535(a)(2).

IRREPARABLE AND IMMEDIATE HARM

33. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 32 above.

34. Defendant's continuing refusal to ban vehicular traffic on Volusia County beaches from February 1st through December 31st and continuing refusal to ban

those artificial light sources that negatively impact sea turtles from February 1st through October 31st despite the fact of a "substantial likelihood" of harm to loggerhead, green and leatherback turtles, constitutes an irreparable threat to the recovery and continued existence of the threatened loggerhead and endangered green and leatherback turtles.

35. The 1993 and 1994 documented incidents of the harm to sea turtles posed by vehicular traffic on Volusia County beaches and Defendant's continuing refusal to ban those artificial light sources on Volusia County beaches that negatively impact sea turtles demonstrate that this threat is immediate and significant. Plaintiffs' interests are being irreparably injured and Plaintiffs have no remedy at law.

CLAIM FOR RELIEF

36. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 32 above.

37. Defendant's continuing allowance of vehicular traffic on Volusia County beaches from February 1st through December 31st constitutes a "taking" of endangered and threatened species in violation of 16 U.S.C. §1538(a)(1)(B).

38. Defendant's failure to eliminate Artificial light sources, for which Defendant is responsible, that misorient sea turtles on Volusia County beaches from February 1st through October 31st constitutes a "taking" of endangered and threatened species in violation of 16 U.S.C. §1538(a)(1)(B).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that:

39. The Court declare that the allowance of vehicular traffic on Volusia County beaches (except a limited number of vehicles necessary for public safety) annually from February 1st through December 31st constitutes an unlawful "taking" of the loggerhead, green and leatherback turtles in violation of the Endangered Species Act, 16 U.S.C. §1538(a)(1)(B).

40. The Court declare that those artificial light sources, for which Defendant is responsible, that illuminate Volusia County beaches and misorient sea turtles from February 1st through December 31st annually constitutes an unlawful "taking" of the loggerhead, green and leatherback turtles, in violation of the Endangered Species Act, 16 U.S.C. §1538(a)(1)(B).

41. Defendant, Volusia County Council, be permanently enjoined and restrained from permitting vehicular traffic (except a limited number of vehicles necessary for public safety) on Volusia County beaches annually from February 1st through October 31st.

42. Defendant, Volusia County Council, be permanently enjoined and restrained from permitting those artificial light sources for which it is responsible that misorient sea turtles to illuminate Volusia County beaches annually from February 1st through October 31st.

43. The Court award such other relief as is appropriate.

44. The Court award Plaintiffs their costs, expenses, expert witness fees, attorney's fees, and any other reasonable costs of litigation.

Respectfully submitted,

By: /s/ Lesley Blackner
Lesley Blackner, Esquire
Florida Bar No.: 654403
Penland & Block, P.A.
1113 Blackstone Building
233 East Bay Street
Jacksonville, Florida 32202
Attorney for Plaintiffs
Telephone: (904) 632-2100
Facsimile: (904) 353-3756

By: /s/ Lesley Blackner
Peter Zeis, Esquire
Florida Bar No.: 868116
Padawer & Zies, P.A.
2500 West Lake Mary Boulevard
Suite 212A
Lake Mary, Florida 32746
Telephone: (407) 330-3405
Facsimile: (407) 330-9303

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jeffrey D. Keiner, Esquire, Gray, Harris & Robinson, P.A., P.O. Box 3068, Orlando, Florida 32802-3068, and Jamie E. Seaman, Esquire, Assistant County Attorney, County of Volusia, 123 W. Indiana

Avenue, Deland, Florida 32720-4613 by United States Mail this 25th day of October, 1995.

/s/ Lesley Blackner
Attorney

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

MOTION FILED

FEB 16 1999

(2)

No. 98-1137

In the

Supreme Court of the United States

October Term, 1998

THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida,
Petitioner,

v.

LOGGERHEAD TURTLE (Caretta caretta); GREEN TURTLE (Chelonia mydas); SHIRLEY REYNOLDS, and RITA ALEXANDER,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DAVID E. HADDOCK
Of Counsel
Pacific Legal Foundation
2151 River Plaza Drive
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

M. REED HOPPER
Pacific Legal Foundation
2151 River Plaza Drive
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

*FRANK A. SHEPHERD
**Counsel of Record*
Pacific Legal Foundation
P.O. Box 522188
Miami, Florida 33152-2188
Telephone: (305) 499-9807
Facsimile: (305) 436-9048

Counsel for Amicus Curiae Pacific Legal Foundation

23pp

QUESTION PRESENTED

Does the Endangered Species Act impose affirmative obligations on county governments to enact laws that will prevent others from violating the Act?

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, County Council of Volusia County, Florida. Written consent for amicus participation in this case was requested but has been withheld.

IDENTITY AND INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in the litigation of matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

The United States Court of Appeals for the Eleventh Circuit ruled that a party seeking to enforce the Endangered Species Act has standing to claim that a county government "takes" protected species simply by failing to exercise its independent regulatory power for their protection. One consequence of this holding is that it suggests that the Endangered Species Act imposes upon municipal governments an affirmative duty to regulate. PLF believes that the Constitution limits the power of the federal government to interfere with the legislative functions of state and local governments. Several decisions of this Court affirm that proposition. *See New York v. United States*, 505 U.S. 144, 157 (1992); *Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365, 2384 (1997). PLF believes that the erroneous decision by the Eleventh Circuit, if it stands, will result in increasing federal

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[1] Pursuant to Supreme Court Rule 37.6, amicus Pacific Legal Foundation states that no counsel for a party to this action authored any portion of this brief and that no person or entity, other than amicus, made a monetary contribution to the preparation or submission of this brief.

interference in the affairs of state and municipal governments. This would strike at the foundation of our system of federalism.

Attorneys for PLF have participated in numerous cases before this Court and other courts, both as amicus and in representing private persons. For example, we represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and we represented Mrs. Suitum in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). We have also participated as amicus in several cases involving Tenth Amendment issues. See, for example, *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981), and *Printz v. United States*, 521 U.S. 98 (1997).

PLF firmly believes that a review of this matter is necessary in order that the issues involved may be properly considered. If the decision of the Eleventh Circuit is allowed to stand, the opinion below will constitute a substantial diminution of the independence of state and local governments from federal control.

For the foregoing reasons, Pacific Legal Foundation requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: February, 1999.

Respectfully submitted,

DAVID E. HADDOCK
Of Counsel
Pacific Legal Foundation
2151 River Plaza Drive
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

M. REED HOPPER
Pacific Legal Foundation
2151 River Plaza Drive
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

*FRANK A. SHEPHERD
**Counsel of Record*
Pacific Legal Foundation
P.O. Box 522188
Miami, Florida 33152-2188
Telephone: (305) 499-9807
Facsimile: (305) 436-9048

Counsel for Amicus Curiae Pacific Legal Foundation

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STATEMENT OF THE CASE

Amicus adopts Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

Volusia County, Florida (County), has not made it illegal to turn on a porch light in Daytona Beach. According to the respondents, this failure to regulate constitutes a violation of the Endangered Species Act (ESA).

Respondents urge that the use of artificial beachfront lighting during hatching season may injure or "take" turtles in violation of the ESA. It is not the County's lights that cause this problem, however. It is rather the lights of individual car drivers, homeowners, and communities near the beach. Instead of bringing an action against each individual that has allegedly violated the ESA, Respondents find it more efficient to simply sue the County for not regulating the behavior of those individuals.

The precise issue before the Court is whether the ESA imposes a duty on states and municipalities to exercise their lawmaking power in a specified manner. The more fundamental question implicated by respondents' case, however, is whether Congress has the power to require states, cities, and counties to enact specific laws. This is not an isolated question. Already, similar suits have been filed against Massachusetts state officials, and the Town of Plymouth, Massachusetts. *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), *cert denied*, 118 S. Ct. 1830 (1998); *United States v. Town of Plymouth, Massachusetts*, 6 F. Supp. 2d 81 (D. Mass 1998). The capacity for mischief authorized by the decision of the court below is nearly unbounded. It is not enough that the ESA involves federal agents in local land use planning. With the decision below, the ESA now also permits federal agents to co-opt the lawmaking and policing functions of local governments to serve federal ends.

If the ESA does not impose a duty to regulate, the County's failure to regulate cannot be a legal cause of the Respondents' harm, and their harm is not "fairly traceable" to the Petitioner. The "fairly traceable" element of Article III standing looks at the causal connection between the plaintiff's harm and the defendant's conduct. It is a fundamental principle of causation, recognized by this Court, that a failure to act is not a legal cause of harm unless there is a duty to act. If the ESA does not impose a duty to regulate, the Respondents would lack standing to pursue this claim in federal court.

ARGUMENT

I

THE FEDERAL GOVERNMENT'S PRACTICE OF REQUIRING STATE ENFORCEMENT OF FEDERAL POLICY DECISIONS IS A GROWING CONSTITUTIONAL PROBLEM THAT SHOULD BE ADDRESSED NOW

In the decision below, the United States Court of Appeals for the Eleventh Circuit found implicitly that the ESA imposes upon municipal governments a duty to enact all regulations that are necessary to prevent third parties from harming or harassing endangered species. In effect, this mandate would require state and local governments to anticipate all the possible ways that endangered species might be harmed by third parties, and it would compel these governments to enact regulations factually sufficient to prevent that harm. If, in good faith, a county government enacts an ordinance that is intended to protect endangered species, as Volusia County did here, and in fact the ordinance is not sufficiently strict to actually prevent harm, such a county would be subject to liability for a "take" under the ESA.

The Eleventh Circuit's interpretation of the ESA in this case is typical of a growing trend that involves courts imposing upon state and local governments affirmative duties to use their regulatory powers to serve federal policy objectives. This Court

has already seen at least one case that presented these problems. *See Strahan v. Coxe*, 127 F.3d 155.[2] In *Strahan v. Coxe*, the First Circuit held that a governmental entity can "take" protected species merely by permitting the use of gillnets. The court thus required the state to stop allowing the use of gillnets.

The case at bar presents an even more direct interference with the conduct of state officers. Whereas in *Strahan v. Coxe* it was arguable that the state had actually done something to at least encourage a "take" by issuing permits to those who wished to use gillnets, in this case there can be no such claim. In this case, Petitioner has done nothing more than fail to regulate. If there is a clear place to draw a line beyond which the power of the ESA may not extend, that place is presented in this case. This Court has provided a long history of substantial authority prohibiting federal invasion of state and local power. *See, e.g. New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365 (1997). Drawing the line here would not be extraordinary.

Strahan v. Coxe and the Eleventh Circuit's decision in this case stand for the proposition that the ESA requires state and local governments to use their regulatory powers to enforce the strictures of the ESA. In other cases, federal courts have shown how intrusive this mandate can become. For example, in *United States v. Town of Plymouth, Massachusetts*, the United States Fish and Wildlife Service sought a preliminary injunction to prohibit the town from allowing off-road vehicles to drive on the beach where they threaten a population of protected birds, piping plovers. Without noting any constitutional problems, the district court suggested that the town's "failure to act quickly and

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[2] Although this Court did not ultimately grant review in *Strahan v. Coxe*, it did express some interest in these issues by inviting the Solicitor General to file a brief expressing the views of the United States. *See Coates v. Strahan*, 118 S. Ct. 1830 (1998). The Solicitor General urged this Court to vacate the First Circuit's opinion.

decisively" caused the taking of at least one plover chick. *Plymouth*, 6 F. Supp. 2d at 91.

In issuing a preliminary injunction, the court not only required the Town of Plymouth to forbid beach access to off-road vehicles, but it also turned the municipality into an appendage of the United States Fish and Wildlife Service. The court's order required the town to "conduct monitoring of piping plovers and their nests by a qualified biologist," which monitoring "shall be conducted not less than three times per week." *Id.* at 92. In some cases, the town is obligated to identify each piping plover nest and monitor each nest "at least twice per day, at dawn and dusk." *Id.* at 93. Municipal employees are required to "maintain and regularly update a log of the numbers and locations of unfledged plover chicks on each beach." *Id.* The town must provide reports to the Fish and Wildlife Service on a bi-weekly basis, including information about every nest, egg, and bird. *Id.* at 93-94.

If other courts follow the lead set by *United States v. Town of Plymouth*, *Strahan v. Coxe*, and *Loggerhead Turtle v. County Council of Volusia County*, we can reasonably expect the Fish and Wildlife Service and the National Marine Fisheries Service to begin directing the regulatory functions of state and local governments nationwide.

In light of the momentum that this type of federal invasion of state sovereignty has gained, intervention by this Court is desperately needed. Interference with state and local government, in the name of protecting species, is only likely to increase. This case presents a good place to draw the line.

Review by this Court is necessary to settle this important question.

II

THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER THE STANDING DOCTRINE PERMITS A PLAINTIFF TO CLAIM THAT A MUNICIPAL GOVERNMENT "TAKES" ENDANGERED SPECIES BY DOING NOTHING

The "fairly traceable" element of standing requires that there be a causal connection between the injury and the conduct complained of, such that the injury is "fairly . . . trace[able] to the challenged action of the defendant." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Where the injury to plaintiffs is "highly indirect," and "results from the independent action of some third party not before the court," it is "substantially more difficult to meet the minimum requirement of Article III." *Allen v. Wright*, 468 U.S. 737, 757-58 (1984) (quoting *Simon*, 426 U.S. at 42; *Warth v. Seldin*, 422 U.S. 490, 505 (1975)). In exploring this causal connection, courts are not limited to examining bare questions of causation in the abstract but, rather, standing inquiry "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. at 500.

In this case, Respondents have alleged that Volusia County has "taken" turtles under the ESA by failing to regulate. It is axiomatic that a failure to act cannot be a legal cause of harm unless there is a duty to act. This Court must address whether the ESA does, and constitutionally can, impose upon Volusia County a duty to prevent the "take" of protected species by third parties. If Volusia County has no duty to act under the ESA, its failure to regulate is not a legal cause of harm, and the Respondents' harm is not "fairly traceable" to the acts of Volusia County. Respondents then have no standing.

A. Volusia County Did Not Affirmatively Cause Harm but Merely Failed to Regulate

Before considering whether the ESA allows the possibility of a municipal "take" through nonfeasance, it is essential to examine exactly what Volusia County is alleged to have done.

Volusia County actually passed an ordinance that was intended to protect sea turtles by limiting beachfront lighting. Respondents complain that, by exempting Daytona Beach and Daytona Beach Shores from the ordinance, the County has caused the take of turtles. *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1249 (11th Cir. 1998). Respondents further claim that the Minimum Environmental Standards for Sea Turtle Protection, even where they apply, are "too lax to prevent takes." *Id.*

Thus, Respondents are not concerned with what Volusia County did but, rather, what it failed to do. By failing to absolutely forbid all beachfront lighting that harms turtles, Respondents claim, the County has "taken" turtles, even though the independent acts of third-party light owners directly caused the harm.

This Court has never found causation in such cases but, rather, has explained

> that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act. This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State.

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 164 (1978) (internal quotation marks and citations omitted). If Volusia County had actually compelled the various communities and private landowners within its boundaries to utilize beachfront lighting in a way that would harm protected sea turtles, it might fairly be said that the County had caused the turtle's harm. But

Volusia County's "mere acquiescence" in the decisions of private landowners and independent communities to operate beachfront lighting does not convert that conduct into County action. No affirmative conduct on the part of Volusia County has harmed sea turtles. At most, Volusia County has merely failed to regulate.

B. Can a Failure to Regulate Be a Legal Cause of Harm in the Absence of a Duty to Act?

The law has long recognized the principle that a failure to act cannot be a legal cause of harm unless there is a duty to act. Prosser has explained that, for a court to find liability for nonfeasance, "it is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." William L. Prosser, *Handbook of the Law of Torts* § 56, p. 339 (1971). This principle has been recognized by several federal courts. *See, e.g., Maruho Company, Ltd. v. Miles, Inc.*, 13 F.3d 6, 10 (1st Cir. 1993) (explaining that "[t]o predicate tort liability upon a negligent omission, one must find a special relationship, between defendant and plaintiff, that imposes a duty upon the defendant to take positive steps to protect the plaintiff"); *LaFountain v. Webb Industries Corporation*, 951 F.2d 544, 548 (3d Cir. 1991) (noting that nonaction creates liability only where there is a duty to act).

The Eastern District of California has explained this principle in the context of river contamination under Comprehensive Environmental Response Compensation, and Liability Act (CERCLA):

> It could always be said to be "foreseeable" that laws . . . retarding industrial activity will . . . decrease pollution in the aggregate, and that any particular release . . . might have been prevented or reduced with the passage of [a law]. However, that cannot be the threshold for legal or proximate cause. If it were,

> the United States would be one of the "causes" of contamination in every CERCLA action because the federal government always could have enacted legislation regulating industrial activity.

United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1263, 1275 (E.D. Cal. 1997). In the same way, if a failure to regulate could be the legal cause of "take" under the ESA, local governments would always be causes of "take" sufficient to support standing. Even this Court has acknowledged that liability for an omission is actionable only where there is a duty to affirmatively act. *See Chiarella v. United States*, 445 U.S. 222, 228 (1980) (explaining that "one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so").

Does the ESA require the application of a different principle? Before the decision of the Eleventh Circuit, the ESA had never been interpreted to suggest that a failure to regulate can cause a "take" of species in the absence of a particular duty to act. In fact, the United States itself, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, argued that an omission can constitute a "take" "only if there is a legal duty to act." *Sweet Home*, 515 U.S. 687, 716 (1995) (Scalia, J., dissenting) (discussing the Secretary of the Interior's position on omissions). No legal authority suggests that a different principle should be applied here.

This important question of federal law has far reaching implications and should be resolved by this Court.

III

THIS CASE ALSO RAISES THE IMPORTANT QUESTION OF WHETHER THE ESA CAN CONSTITUTIONALLY IMPOSE UPON MUNICIPAL GOVERNMENTS A DUTY TO REGULATE FOR THE PROTECTION OF ENDANGERED SPECIES

"The Endangered Species Act was enacted with the purpose of conserving endangered and threatened species and the ecosystems on which they depend." *Strahan v. Coxe*, 127 F.3d at 161; *see* 16 U.S.C. § 1531. Among other provisions, "the ESA prohibits any person from 'tak[ing] any [endangered] species within the United States or the territorial sea of the United States." *Strahan*, 127 F.3d at 161-62; 16 U.S.C. § 1538(a)(1)(B). The ESA makes clear that its provisions apply to municipal governments, just as they apply to private citizens. 16 U.S.C. § 1532(12) (defining "person" to include "any . . . municipality, or political subdivision of a State"). But does the ESA require municipal governments to enact regulations to enforce its provisions?

A plain reading of the ESA does not reveal any language directing municipal governments to regulate in favor of endangered species. Although Section 9 of the ESA lists all the acts that are unlawful under the ESA, it does not expressly claim that municipal governments can "take" endangered species by failing to regulate. 16 U.S.C. § 1538. The word "take" itself, which is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," implies affirmative conduct and does not suggest that a failure to regulate might violate the Act. 16 U.S.C. § 1532(19).

Similarly, Section 6 of the ESA authorizes the Secretary of the Interior to cooperate with states in conserving endangered species. 16 U.S.C. § 1535. But no provision of Section 6 obligates municipal governments to affirmatively prohibit any

act on the part of third parties that might "take" endangered species. *Id.* No other provision of the ESA, nor its legislative or regulatory history, purports to require municipalities to use their regulatory power to protect endangered species.

Implicit in the decision of the Eleventh Circuit, however, is the proposition that the "take" provision itself imposes upon municipalities an affirmative duty to regulate. Because this proposition is opposed both by the Constitution and by established principles of statutory construction, it requires resolution by this Court.

A. The Tenth Amendment Prohibits the Federal Government from Imposing upon the States or Their Subdivisions a Duty to Administer or Enforce Federal Regulatory Programs

This Court has explained that, under the Tenth Amendment, "the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. at 157. Among those limits, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 117 S. Ct. at 2384.

The sole challenge in *New York v. United States* was the *method* by which Congress chose to regulate: forcing states to take title to radioactive waste, or alternatively, requiring them to legislate in a certain manner. *New York*, 505 U.S. at 160. In invalidating the Low-Level Radioactive Waste Policy Act, this Court explained that Congress could validly direct states to regulate according to federal standards either by making the grant of federal funds dependent upon state compliance with federal mandates, or by offering the states the choice of regulating according to federal standards or having state law preempted by a federal program administered by the federal

government. *Id.* at 167. But each of these valid means consists only of "encouraging a State to conform to federal policy choices," while allowing "the residents of the State [to] retain the ultimate decision as to whether or not the State will comply." *Id.* at 168. The "take title" provisions at issue in *New York* were unconstitutional because they did not employ either of these permissible means.

As interpreted by the Eleventh Circuit in this case, municipal governments are not offered federal funds, nor are they offered a choice between following federal standards or direct federal regulation. Rather, the Eleventh Circuit's interpretation of the ESA amounts to a simple mandate directing municipal governments to exercise their formerly independent regulatory power to serve federal ends. Imposing this type of duty is contrary to the principles of *New York*.

In *Printz v. United States,* this Court found that Congress could not force local officials to carry out federal duties:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Printz v. United States, 117 S. Ct., at 2384.

The Eleventh Circuit's interpretation of the ESA provides a private right of action to individual persons to employ federal law "to compel the States to enact or enforce a federal regulatory program." Interpreted this way, the ESA attempts to circumvent the constitutional protection that prevents Congress from forcing states to act to implement federal programs. For this reason, the Eleventh Circuit's interpretation of the ESA is contrary to *Printz*.

The decision of the Eleventh Circuit, and the rationale upon which it is based, deprives the residents of Volusia County of the ultimate decision as to whether their County will affirmatively enforce the Endangered Species Act. In a case like this one, where the court decides Volusia County has failed to actually prevent harm by third parties to protected species despite its efforts to do so, the Eleventh Circuit sees no constitutional problem with fashioning a remedy "that would adequately bring about Volusia County's compliance with the ESA." *Loggerhead*, 148 F.3 at 1254. In other words, if Volusia County chooses not to exercise its regulatory power to enforce the ESA, or if the County chooses to regulate but is not entirely effective in preventing harm to protected species, the Eleventh Circuit is prepared to require the County to regulate until harm by third parties is actually prevented.

This Court's Tenth Amendment jurisprudence prohibits the federal government from meddling with the independent legislative functions of the political subdivisions of sovereign states. To the extent federal courts interpret the ESA to compel regulation on behalf of local governments, they shift political accountability for enforcement activities off of federal officers and on to local officials.

Because it would force municipal governments to exercise their regulatory powers to serve federal policy choices, the Eleventh Circuit's interpretation of the ESA runs afoul of this Court's Tenth Amendment jurisprudence.[3] Accordingly, this

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[3] Petitioners have also offered this Court a substantial discussion of how the Tenth Amendment limits the power of the ESA to compel the regulatory action of Volusia County. Even though the Eleventh Circuit stated that Volusia County has not raised Tenth Amendment or federalism concerns, these issues are appropriately raised before this Court for two reasons. First, the extent of Congress' power to impose upon municipal governments a duty to regulate is integral to the question of whether Respondents' harm is "fairly traceable" to

(continued...)

Court should decide whether the ESA can constitutionally impose upon municipal governments a duty to regulate.

B. Settled Principles of Statutory Construction Require Federal Courts to Interpret Federal Statutes So as to Avoid Constitutional Problems

This Court has explained that

> federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid.

Communications Workers of America v. Beck, 487 U.S. 735, 762 (1988).

As an initial matter, it is clear that the Eleventh Circuit's interpretation of the ESA raises serious constitutional problems. If, as the Eleventh Circuit and Respondents suggest, municipal governments can "take" protected species merely by doing nothing, the ESA effectively imposes upon municipalities a duty to implement and enforce its provisions. As noted above, and as discussed in great detail by Petitioner, imposing such a duty would interfere with the sovereign power of the states in violation of the Tenth Amendment.

No language in the Endangered Species Act expressly imposes upon municipalities an affirmative duty to regulate in favor of protected species. The constitutional problem arises

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[3](...continued)
Volusia County. If Volusia County has no duty to implement the ESA, its failure to act cannot be a legal cause of Respondents' harm. Second, it is the decision of the Eleventh Circuit itself that has purported to find in the ESA a federal power to compel municipal regulation. Thus, the Tenth Amendment is implicated by the opinion of the court of appeals. Therefore, review is appropriate here.

only from the Eleventh Circuit's conclusion that, under Section 9 of the ESA, a municipality may "take" endangered species by failing to regulate for their benefit.

A different reading of the ESA is possible. The word "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). This definition implies that only affirmative conduct, and not something as passive as a failure to regulate, can violate the Act. The federal regulations do define "harass" to include "an intentional or *negligent act or omission* which creates the likelihood of injury to wildlife." 50 C.F.R. § 17.3 (emphasis added). Likewise, the definition of "harm," which means "an act which actually kills or injures wildlife," has been interpreted by the Secretary of the Interior to include omissions. *Id.*; *see Sweet Home*, 515 U.S. at 716 (Scalia, J., dissenting) (discussing the Secretary of the Interior's position on omissions). However, the United States has previously informed this Court that "an 'omission' constitutes an 'act' . . . only if there is a legal duty to act." *Sweet Home*, 515 U.S. at 716 (Scalia, J., dissenting). These definitions, and the interpretation of the United States, seem to refer to legal duties that might exist outside of the ESA itself, or at least outside of the "take" provision. After all, if the ESA itself imposed an affirmative duty to act on the part of municipal governments, a failure to act would constitute a "take" in all circumstances, as long as protected species were harmed. If such were the case, it would make little sense to refer in the definitions to negligence or other duties.

The search for an affirmative duty to regulate in the ESA is a strained one. No other court has found any text in the ESA that imposes upon municipal governments a duty to regulate to protect endangered species. Likewise, no other court has justified the existence of such a duty by deduction or inference. Neither respondents nor the Eleventh Circuit has suggested any statutory source for such a duty.

Nevertheless, the Eleventh Circuit interprets the ESA to impose an affirmative duty on local governments to enact regulations to enforce the ESA. The failure to enact regulations then becomes an omission that, under the federal regulations, constitutes a "take" of any affected endangered species. This position casts aside a reasonable alternative interpretation that would avoid a serious constitutional issue by not reading into the act an affirmative duty of state and local governments to assume the burdens and obligations of enforcing this federal program.

CONCLUSION

Under the "fairly traceable" element of Article III standing, a plaintiff can pursue her case in federal court only if there is a meaningful causal relationship between the plaintiff's harm and the defendant's conduct. It is a fundamental principle of causation that a failure to act is not a legal cause of harm unless there is a duty to act. In this case, Respondents allege that their harm is caused by Volusia County's failure to effectively regulate. Can this failure to act be a legal cause of Respondents' harm in the absence of a duty to regulate? Does the Endangered Species Act impose upon municipalities a duty to regulate to serve its purposes? Does the Tenth Amendment prohibit the ESA from imposing such a duty? It is essential that this Court answer these questions.

The Eleventh Circuit's interpretation diminishes the independence of municipalities and transform them into appendages of the United States Fish and Wildlife Service. Such an erosion of state independence threatens the principles of federalism that lie at the foundation of our most basic freedoms.

For these reasons, this Court should grant the writ of certiorari.

DATED: February, 1999.

Respectfully submitted,

M. REED HOPPER
*FRANK A. SHEPHERD
*Counsel of Record
Pacific Legal Foundation
P.O. Box 522188
Miami, Florida 33152-2188
Telephone: (305) 499-9807
Facsimile: (305) 436-9048

DAVID E. HADDOCK
Of Counsel
Pacific Legal Foundation
2151 River Plaza Drive
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Counsel for Amicus Curiae Pacific Legal Foundation

No. 98-1137

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida,

Petitioner,

v.

LOGGERHEAD TURTLE (Caretta caretta), GREEN TURTLE (Chelonia mydas), LEATHERBACK TURTLE (Dermochelys Coriacea), SHIRLEY REYNOLDS and RITA ALEXANDER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Of Counsel:

STEVEN DAVISON
University of Baltimore
School of Law
1420 North Charles Street
Baltimore, Maryland 21201
(410) 837-4504

JOHN F. KOSTYACK
Counsel of Record
National Wildlife Federation
1400 16th Street NW, Suite 501
Washington, DC 20036-2266
(202) 797-6800

LESLEY BLACKNER
123 Australian Avenue
Palm Beach, Florida 33480
(561) 659-5754

Attorneys for Respondents

151910

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a citizen has standing to sue a county government under the Endangered Species Act for permitting activities that take threatened and endangered species?

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OPINIONS BELOW

In addition to the opinions identified in Petitioner's statement, the United States District Court for the Middle District of Florida issued an order on September 16, 1996, denying Petitioner's motion for partial summary judgment as to beachfront lighting in unincorporated areas of Volusia County.

STATEMENT OF THE CASE

A. Proceedings Before the District Court

In June 1995, Respondents filed this action pursuant to section 9 of the Endangered Species Act (ESA), 16 U.S.C. § 1538(a)(1)(B), against Petitioner for taking threatened and endangered sea turtles through its harmful beach driving and lighting policies.[1] Appendix to the Petition for Certiorari [hereinafter "Pet. App."] 160. Contrary to the arguments in Petitioner's brief (Pet. i., 8-14), Respondents did not challenge a "failure to regulate." Instead, they sought, among other things, an injunction preventing Petitioner "from *permitting* vehicular traffic . . . on Volusia County beaches" and

> from *permitting* those artificial light sources for which it is responsible that misorient sea turtles to illuminate Volusia County beaches annually from May 1st through October 31st.

Pet. App. 179 (emphasis added). *See also id.* at 202.

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1. Under the ESA, taking or take means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(18). *See also* 16 U.S.C. § 1538(g) ("It is unlawful for any person . . . to commit, . . . *or cause to be committed*, any offense defined in this section.") (emphasis added).

On August 1, 1995, the district court issued a preliminary injunction against Petitioner, prohibiting it from allowing beach driving at certain specified times and in certain locations. *Id.* at 119.[2] Rather than appealing the beach driving injunction, Petitioner applied to the U.S. Fish and Wildlife Service (FWS) for an Incidental Take Permit (ITP) which would enable it to continue to permit a limited amount of beach driving on the condition that it would implement conservation measures. *Id.* at 4-6, 72-73.

Petitioner thereafter filed two separate motions for partial summary judgment concerning its beachfront lighting policies. On July 9, 1996, the district court granted Petitioner's motion with respect to beachfront lighting in four incorporated municipalities, holding that Respondents lacked standing due to insufficient proof of causation and redressability. *Id.* at 89.[3] On September 16, 1996, the district court denied Petitioner's motion with respect to beachfront lighting in the unincorporated areas of Volusia County, holding that a "material factual issue exists as to whether the artificial beachfront lighting controlled by Volusia County's [sic] is responsible for 'taking' sea turtles." Order Denying Volusia County's Motion for Partial Summary Judgment, dated September 16, 1996 [hereinafter "September 16, 1996, Order"] at 1. Rather than proceeding to trial on whether it was responsible for permitting harmful beachfront lighting in unincorporated areas, Petitioner persuaded FWS to add

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2. The court denied Respondents' request for a preliminary injunction prohibiting the County from allowing artificial lighting that harms sea turtles. Pet. App. 115.

3. In the same Order, the district court denied Respondents' motion for leave to add the leatherback turtle as a party. Pet. App. 89.

beachfront lighting restrictions to its proposed ITP. The ITP was finalized and issued by FWS in November 1996. Pet. App. 6.

Petitioner subsequently filed a motion to dismiss the case, arguing that the ITP rendered moot Respondents' claims as to both beach driving and lighting. *Id.* at 71. Respondents conceded that their beach driving claims were moot, but argued that the lighting claims remained valid because incidental takings through lighting had not been expressly permitted in the ITP. *Id.* On December 20, 1996, the district court granted Petitioner's motion to dismiss, holding that incidental takings from artificial lighting were "within the scope" of the ITP even though not explicitly permitted. *Id.* at 74.

Throughout the proceedings before the district court, Petitioner never expressed any Tenth Amendment concerns about Respondents' efforts to hold it responsible for indirectly taking sea turtles through its beachfront lighting policies.

B. Proceedings Before the Court of Appeals

The Eleventh Circuit Court of Appeals reversed three district court rulings against Respondents and remanded for a trial on Respondents' beachfront lighting claims. First, it overturned the district court's ruling of December 20, 1996, holding that the ITP did not authorize incidental takings from beachfront lighting and that Respondents' claims concerning lighting were therefore *not* mooted by the ITP. *Id.* at 11-34, 63. Second, it overturned the district court's partial summary judgment ruling of July 9, 1996, holding that Respondents had standing to sue Petitioner under the ESA with respect to beachfront lighting harmful to sea turtles in four incorporated

municipalities. *Id.* at 35-55, 63. Third, it overturned the district court's July 9, 1996, order refusing to allow Respondents leave to add the leatherback turtle as a party. *Id.* at 56-64.

The court of appeals had no occasion to address the applicability of the Tenth Amendment to Respondents' claims because, as the court noted, Petitioner had failed to raise the issue. *Id.* at 53 n.26. Even after the court of appeals noted this failure, Petitioner filed a petition for rehearing in the appeals court that made no mention of the Tenth Amendment. *See* Suggestion for Rehearing En Banc (11th Cir. August 20, 1998).

C. Proceedings Before the District Court on Remand

After remand, the district court set a trial date of February 1, 2000. Thereafter, Petitioner voluntarily enacted a new beachfront lighting ordinance, superceding the ordinance (Pet. App. 152-59) that was at issue in the court of appeals. It also budgeted $100,000 for county staff to develop an ITP that, if approved by FWS, would render Respondents' beachfront lighting claims moot.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DECLINE REVIEW BECAUSE THE RULING BELOW IS NOT FINAL AND FURTHER PROCEEDINGS ARE NEEDED TO RESOLVE DISPUTED MATERIAL FACTS.

The court of appeals ruling at issue simply holds that Respondents have standing to sue Petitioner under the ESA for authorizing activities that take threatened and endangered sea turtles. According to the court of appeals, "the regulatory acts of governmental entities can cause takes of protected wildlife" because the "regulatory entity purports to make lawful an activity that allegedly violates the ESA." Pet. App. 46. As Petitioner concedes, this principle is not new — it is well-established in the ESA case law. *See* Pet. 12.

Rather than proceeding to trial on whether it has indeed authorized activities that take threatened and endangered sea turtles, Petitioner asks the Court to intervene before trial in reliance on Petitioner's highly-disputed version of the facts. The Court should reject this invitation and instead should follow its usual practice of declining to review interlocutory rulings. *See Virginia Military Institute v. United States*, 508 U.S. 946 (1993).

According to Petitioner, Respondents can never have their day in court because the Tenth Amendment precludes an ESA challenge to a county's "failure to regulate." Pet. i, 8. However, nowhere in the pleadings do Respondents contend that they are challenging a "failure to regulate."

Respondents' complaint seeks to enjoin Petitioner from affirmatively "permitting" beachfront lighting that harms threatened and endangered sea turtles. Pet. App. 202.[4] The proper venue for deciding the factual dispute of whether this case involves a mere failure to regulate (as Petitioner contends) or the affirmative act of permitting conduct harmful to sea turtles (as Respondents contend) is the district court.[5]

The inappropriateness of interlocutory review is highlighted by the fact that Petitioner seeks a determination of whether it can be "held responsible" under the ESA given the facts of this case. Pet. i. The Court's review of such an issue would be a gross waste of judicial resources because Petitioner's ESA liability, if any, has not yet been decided by the lower courts and the relevant facts upon which such a liability determination will be made are not yet known. The facts have changed significantly since the court of appeals ruling — for example, the ordinance under consideration in that ruling (Pet. App. 152-59) is no longer in effect — and could easily change again before trial. Indeed, because

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4. The court of appeals recognized that Respondents were challenging Petitioner's authorization of harm to threatened and endangered species, not a failure to regulate. *See* Pet. App. 51 ("Volusia County is alleged to be a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species") (citations and quotations omitted).

5. At trial, the district court will need to consider the extent to which Petitioner's recently-enacted lighting ordinance authorizes beachfront lighting harmful to sea turtles at both County-owned facilities and private facilities within Volusia County's unincorporated areas. The court will also need to consider Petitioner's role in causing harmful lighting within incorporated municipalities, taking into account both the new ordinance and the County's unique charter. *See* Pet. App. 143.

Petitioner has initiated the process of obtaining an ITP for beachfront lighting, there is a reasonable likelihood that this entire case will become moot before this Court could address the merits. The Court should reject Petitioner's invitation to speculate about whether ESA liability could be imposed under some hypothetical factual scenario that may or may not be presented to the district court.

II.

THE COURT SHOULD DENY THE PETITION BECAUSE THE ISSUE IT RAISES WAS NOT LITIGATED IN THE COURTS BELOW.

The sole issue on which Petitioner seeks review, whether the Tenth Amendment precludes a judicial interpretation of the ESA that would hold Petitioner responsible under that law for "failure to regulate" (Pet. i and 8-14), was never raised by Petitioner in the litigation below. *See* Pet. App. 53 n.26. Considering the complexity and importance of the issue, the district court and court of appeals should fully evaluate it before it is brought before this Court.[6] The Court should follow its usual practice of refusing to consider issues that have not been litigated in the lower courts. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 1956 (1998).

Petitioner argues that it expressed its Tenth Amendment concerns in the courts below by stating them in terms of

6. In the district court, Respondents would offer evidence of (among other things) extensive cooperative efforts among federal, state and local authorities on sea turtle conservation — efforts that directly undercut Petitioner's argument that ESA enforcement has resulted in federal intrusion into state and local affairs. *See* Pet. 8.

redressability and separation of powers between courts and legislatures. Pet. App. 12 n.3. However, the Tenth Amendment deals with the allocation of power between federal and state governments, not with the separation of powers between courts and legislatures. Therefore, nothing in Petitioner's arguments gave the courts below any inkling that Petitioner had concerns about federal intrusion into areas of state authority.

To the contrary, during most of this litigation Petitioner has accepted the very premise of Respondents' lawsuit that it now questions, *i.e.*, that a county's regulatory activities are subject to the restrictions of the ESA. For example, after the district court issued its preliminary injunction against authorizing beach driving that harms sea turtles, Petitioner elected not to appeal and instead applied to FWS for an ITP for beach driving. Pet. App. 5-6. Similarly, after the district court denied its motion for partial summary judgment concerning harmful beachfront lighting in the unincorporated areas of Volusia County (*see* September 16, 1996, Order), Petitioner elected not to go to trial and instead negotiated an expansion of its beach driving ITP to include beachfront lighting restrictions. Pet. App. 5-6.

Petitioner thereafter sought dismissal of Respondents' claims — not because of improper federal intrusion into its affairs, but because (according to Petitioner) the federal government had properly exercised its authority over Petitioner's activities insofar as they affect sea turtles and thereby rendered Respondents' claims moot.[7] In the court of

7. *See, e.g.*, Volusia County's Supplemental Motion to Dissolve Preliminary Injunction and Dismiss Case at 4 (M.D. Fla. Dec. 18, 1996) ("By issuing an Incidental Take Permit conditioned upon (Cont'd)

appeals, Petitioner likewise expressed satisfaction with federal involvement.[8]

Petitioner attempts to explain its failure to raise the Tenth Amendment issue in the courts below by arguing that the court of appeals ruling now "crystallizes the issue." Pet. 12 n.3. However, the ruling merely affirms that Respondents have standing to pursue their beachfront lighting claims, it does not alter those claims or specify the relief to which Respondents will be entitled if they prove liability. Petitioner has been aware of Respondents' claims since they were filed in 1995. Even assuming *arguendo* that those claims gave rise to a legitimate Tenth Amendment issue (as explained below, they do not), Petitioner was obligated to litigate that issue in the courts below before raising it in this Court.

III.

THE COURT SHOULD DECLINE REVIEW BECAUSE PETITIONER HAS IDENTIFIED NO CONFLICT IN THE CIRCUITS.

As Petitioner apparently concedes (*see* Pet. 12), there are no conflicts in the circuit courts that need to be resolved by this Court. The Eleventh Circuit court of appeals simply

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(Cont'd)

Volusia County's compliance with the ten separate items regarding beach lighting, the Department of the Interior has exercised its statutory authority and jurisdiction over the beach lighting issues").

8. *See, e.g.*, Answer Brief for Appellee at 24 (11th Cir. Aug. 13, 1997) ("FWS provided *reasonable requirements* [in the ITP] for correcting or minimizing takings from artificial lighting . . . .") (emphasis added).

followed a principle well-established in a long line of ESA rulings in other circuits — that a government agency is prohibited by section 9 from authorizing or permitting activities that take threatened or endangered species. *See, e.g.*, *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (state agency violated section 9 by licensing commercial fishing operations in habitat of endangered whale), *cert. denied*, 119 S. Ct. 81 (1998); *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (federal agency illegally caused takes of the endangered black-footed ferret through its "decision to register pesticides even though other persons actually distributed or used the pesticides"); *Palila v. Hawaii Dep't of Land & Nat. Resources*, 639 F.2d 495, 497-98 (9th Cir. 1981) (state's practice of maintaining feral goats and sheep in habitat of endangered bird constituted a section 9 taking); *National Wildlife Federation v. Hodel*, 23 Env't Rep. Cas. (BNA) 1089, 1985 WL 186,671 (E.D. Cal. 1985) (federal agency's allowance of the use of lead shot ammunition resulting in poisoning of bald eagles is a section 9 taking).

Liability for authorizing activities harmful to threatened and endangered species is also consistent with this Court's ruling in *Babbitt v. Sweet Home Chapter of Better Communities for a Great Oregon*, 515 U.S. 687 (1995), which makes clear that liability is imposed under section 9 for both direct and indirect takings. *See, e.g., id.* at 698 n.11 ("harm" element of ESA's take prohibition conveys "sense of indirect causation").

Rather than attempt to identify a conflict in the circuits, Petitioner purports to identify a new principle in the court of appeals ruling — that liability can be imposed for the mere "absence of local legislative control." Pet. 12. However, the

ruling below does not stand for such a principle; nor can Respondents' pleadings fairly be interpreted as seeking to impose liability under this theory. Given that the district court has not yet had an opportunity to weigh the facts, the Court must disregard Petitioner's self-serving characterization of its conduct as a mere "failure to regulate" or "absence of local legislative control." Pet. i, 12.

IV.

THE ISSUE PRESENTED BY PETITIONER IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THE COURT'S REVIEW.

This case involves no important issues warranting the Court's review. Contrary to Petitioner's assertions, the ruling below does not implicate the Tenth Amendment issue addressed by this Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365 (1997). These cases stand for the proposition that under the Tenth Amendment, Congress cannot compel states to enact or enforce a federal program. *See New York*, 505 U.S. at 149 (Congress violated Tenth Amendment by forcing states to choose between taking title to low-level radioactive waste or regulating the waste according to the direction of Congress); *Printz*, 117 S. Ct. at 2384 (Congress violated Tenth Amendment by conscripting state officers for purpose of implementing federal gun control regulations).

In contrast, the ESA does not compel the states to take any action. Section 9, the provision that Respondents seek to enforce in this action, does not require an affirmative act; it merely prohibits any person (the definition of which includes states) from taking a threatened or endangered species.

16 U.S.C.§§ 1532(13), 1538(a)(1)(B). *See also* 50 C.F.R. § 17.31(a). Given the absence of language in section 9 compelling anyone to enact or enforce a regulatory program, the Tenth Amendment is simply not implicated in this case.[9]

Petitioner attempts to gloss over this basic defect in its Tenth Amendment argument by ignoring the language of section 9. Petitioner instead cites section 6(f) of the ESA, which authorizes state laws that are more restrictive than ESA regulations but prohibits state laws that are less restrictive. According to Petitioner, this provision demonstrates that the ESA is "preemptive, not coercive" with respect to the states, and the court of appeals has violated this ESA principle by requiring it "to adopt a . . . local regulatory scheme in order to avoid liability." Pet. 13. In essence, Petitioner seeks to prove that the court of appeals infringed upon its Tenth Amendment rights by violating ESA section 6(f).

This argument, which Petitioner failed to raise in the courts below, is without merit because it relies upon an inaccurate characterization of the court of appeals ruling. In upholding Respondents' standing to sue, the court of appeals made clear that it was not deciding what relief, if any, Respondents would be entitled to if they were to prevail in the district court. Pet. App. 53-54, 63.[10] In the absence of any

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9. Because section 9 applies broadly to any person and is not targeted at the states, the Tenth Amendment concerns expressed by the Court in *New York* and *Printz* are particularly remote from this case. *See Printz*, 117 S. Ct. at 2383 (*per se* rule of Tenth Amendment applicability used in *New York* and *Printz* does not apply in cases involving "application to the States of a federal law of general applicability").

10. Rather than deciding that Respondents are entitled to a particular remedy, the court of appeals simply identified a range of

(Cont'd)

ruling regarding Respondents' entitlement to relief, Petitioner has no basis for arguing that the court of appeals adopted a "coercive" rather than "preemptive" approach. This Court will not be in a position to evaluate whether section 6(f) has been violated unless and until the district court awards relief and that ruling has been reviewed by the court of appeals.

Finally, Petitioner reveals another serious defect with its Tenth Amendment argument by clarifying that it is not challenging any congressional usurpation of local decisionmaking, but merely contending that local decisionmaking has been "judicially commandeered." *See* Pet. 12 n.3. There is no basis for such an argument under the Tenth Amendment. Although the Tenth Amendment prohibits *Congress* from forcing state officials to implement a federal program, it does not prevent the federal *courts* from requiring state officials to comply with federal law. *See New York*, 505 U.S. at 179.

(Cont'd)
possible remedies that would not violate the constitutional principle of separation of powers. Pet. App. 53-55. Petitioner has not sought this Court's review of the court of appeals ruling on the separation of powers issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN F. KOSTYACK
Counsel of Record
National Wildlife Federation
1400 16th Street NW, Suite 501
Washington, DC 20036-2266
(202) 797-6800

LESLEY BLACKNER
123 Australian Avenue
Palm Beach, Florida 33480
(561) 659-5754

Attorneys for Respondents

Of Counsel:

STEVEN DAVISON
University of Baltimore
School of Law
1420 North Charles Street
Baltimore, Maryland 21201
(410) 837-4504

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No. 98-1137

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida,
Petitioner,

v.

LOGGERHEAD TURTLE (Caretta caretta), GREEN TURTLE (Chelonia mydas), SHIRLEY REYNOLDS, and RITA ALEXANDER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

GALEN G. SCHULER
PERKINS COIE LLP
1201 Third Avenue
40th Floor
Seattle, WA 98101
(206) 583-8442

DANIEL J. POPEO
R. SHAWN GUNNARSON
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

March 18, 1999

22pp

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Pursuant to Rule 37.2(b) of the rules of this Court, the Washington Legal Foundation (WLF) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of Petitioner. Respondents have consented to the filing of this brief, and their letter of consent has been lodged with the clerk of the Court. But Petitioner has withheld its consent, requiring WLF to present the Court with this motion.

WLF is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 States. WLF regularly appears in legal proceedings before federal and state courts to defend and promote free enterprise and individual rights.

WLF has appeared before this Court in several cases involving the interpretation and application of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–44 (1994). *See, e.g., Bennett, et al. v. Spear, et al.*, 117 S.Ct. 1154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995). In addition, WLF has appeared before this Court in cases involving federalism and the Tenth Amendment. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452 (1991). WLF thus brings a broader perspective to the Question Presented than that offered by the parties to this case.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on several occasions.

For the foregoing reasons, WLF and AEF request that the Court grant this motion to file their brief *amici curiae* in support of Petitioner.

Respectfully submitted,

Galen G. Schuler
Perkins Coie LLP
1201 Third Avenue
40th Floor
Seattle, WA 98101
(206) 583-8442

Daniel J. Popeo
R. Shawn Gunnarson
Counsel of Record
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Counsel for *amicus curiae*

March 18, 1999

QUESTION PRESENTED

Whether a county government can be held responsible under the Endangered Species Act by a federal court for the acts of private citizens because of its failure to regulate beachfront lighting.

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INTEREST OF *AMICI CURIAE*

The interest of Washington Legal Foundation and Allied Educational Foundation are set forth in the motion accompanying this brief.[1]

STATEMENT

Along the northeast coast of Florida lie the beachfront communities of Volusia County, a "political subdivision[ ]" of the State of Florida. FLA. CONST. art. VIII, § 1(a). Volusia County is governed according to a home rule charter, which its people adopted through a special election pursuant to the Florida Constitution. *See id.* at § 1(c). As with all "[c]ounties operating under county charters" in Florida, Volusia County has "all powers of local self-government." *Id.* at § 1(g). Among such powers, Petitioner County Council of Volusia County (County) may "enact county ordinances." *Id.* County ordinances supply the only source of local regulation in unincorporated areas, such as Ormond-by-the-Sea, Wilbur-by-the-Sea, Bethune Beach, and the Town of Ponce Inlet. However, incorporated municipalities, such as Daytona Beach, Daytona Beach Shores, Ormond Beach, and New Smyrna Beach, are governed both by county and municipal ordinances. Conflicts between the ordinances are resolved according to the terms of the county charter. *See id.*

Three sections of the Volusia County Home Rule Charter are relevant to this case. Section 202.4 directs the County to "establish minimum standards, proce-

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[1] Pursuant to Supreme Court Rule 37.6, the Washington Legal Foundation states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than the Washington Legal Foundation and its counsel, contributed monetarily to the preparation and submission of this brief.

dures, requirements and regulations for the protection of the environment." Pet. App. 143. Such regulations "shall apply within all the incorporated and unincorporated areas of Volusia County," except that "the governing body of each municipality may establish more restrictive standards . . . for the protection of the environment." *Id.* Section 205.2 authorizes the County "to enact an ordinance . . . comprehensively regulating public health, safety, and welfare on and pertaining to the beach . . . ." *Id.* at 144. And Section 205.5 gives the County "exclusive authority to regulate the beaches and public beach access and use." *Id.* at 145. Although county ordinances adopted under this section "prevail in the event of conflict with a municipal ordinance," *id.* at 146, "unless otherwise agreed, the county will not be liable for any act of a municipality." *Id.* at 145.

Pursuant to its authority under the charter, the County adopted Ordinance 89-60 (Ordinance), *codified at* Volusia County Code, art. III, §§ 50-241–50-251, which regulates beachfront lighting to protect sea turtles from injury. *See id.* at 147-59. As the Eleventh Circuit understood it, the Ordinance divides its restrictions into three categories: "(1) lights associated with new development; (2) lights associated with existing development; and (3) lights that are publicly owned." *Id.* at 38. Lighting from new development is regulated by every municipality at issue; each has either adopted regulations that complied with the minimum standards established by the County or has agreed to submit to regulation by the County. *See id.* Lighting from existing development and publicly-owned lighting follows a different pattern. The Ordinance exempts Daytona Beach and Daytona Beach Shores from regulation, and Ormond Beach

and New Smyrna Beach enforce their own regulations, as approved by the County. *See id.* at 39.

Volusia County is home to various species of sea turtles, of which two are named parties to this case. The Loggerhead Turtle is listed by the U.S. Fish and Wildlife Service (Service) as a threatened species. *See* 50 C.F.R. § 17.11(h) (1997). In Florida, the Green Turtle is listed as an endangered species. *Id.*

This case arose when Respondents filed a complaint against the County, seeking declaratory and injunctive relief. They alleged, *inter alia*, that the County's refusal to "ban beachfront artificial lighting sources that adversely impact sea turtles," Pet. App. 183, harms threatened or endangered species, in violation of the Endangered Species Act. 16 U.S.C. §§ 1531–44. (1994) (ESA or Act). They cited federal recovery plans which say that artificial lighting can disorient or misorient hatchlings and impel female turtles to avoid nesting where the beach is artificially illuminated. *See* Pet. App. 168–70.

The County filed a motion for partial summary judgment. It argued that Respondents lack standing to bring a claim under the ESA against the County for takes of listed sea turtles caused by beachfront lighting in the incorporated municipalities of Daytona Beach, Daytona Beach Shores, Ormond Beach, and New Smyrna Beach (Municipalities). The court granted the motion "on the artificial beachfront lighting issue," Pet. App. 84 (July 9, 1996 Order), and Respondents appealed.

A divided panel of the Eleventh Circuit reversed and remanded "for further proceedings consistent

with [its] opinion, including a trial on artificial beachfront lighting . . . ." *Id.* at 64. It concluded that Respondents have standing to sue the County under the ESA "for its regulatory actions affecting light users," *id.* at 63, in the Municipalities. In addition, the court reached out to address substantive issues regarding the County's liability under the Act.

First, the majority left no doubt that the County's regulation of beachfront lighting will be the central issue on remand.

Ormond Beach and New Smyrna Beach have adopted independent ordinances regulating beachfront lighting. *See id.* at 42–43. For this reason, the court found that Respondents could not sue the County for "inadequate enforcement efforts," *id.* at 43, in those municipalities. "This absence of *enforcement* control on Volusia County's part, however, does not defeat the Turtles' standing to sue for inadequate *regulation* . . . ." *Id.* To sever liability for inadequate enforcement from liability for inadequate regulation, the majority directed the district court to assume that Ormond Beach and New Smyrna Beach fully enforce their own ordinances.

> This assumption will focus the trier of fact solely on the regulatory acts of Volusia County in determining whether the Minimum Environmental Standards for Sea Turtle Protection as contained within [the Ordinance] cause "harm" (*e.g.*, insufficient on their face to prevent "harm") to sea turtles in Ormond Beach and New Smyrna Beach.

Id. at 43-44. The court added that the County could avoid liability by proving that its ordinance "if fully enforced, would prevent 'harm' to the Turtles." *Id.* at 44.

Daytona Beach and Daytona Beach Shores are exempted from regulation under the Ordinance. For that reason, the majority panel said that the only genuine issue, for purposes of determining liability, centers on the regulatory acts and omissions of the County in those municipalities.

> At trial, the trier of fact's inquiry can simply be whether the lack of artificial beachfront lighting restrictions in Daytona Beach and Daytona Beach Shores causes "harm" to sea turtles in those locations.

Id. Once again, the majority assured the County that it could defend itself against Respondents' claims by proving that the Ordinance does not injure the turtles, either because "protected sea turtles do not nest or shelter in those locations and/or unrestricted lighting does not 'harm' them." *Id.*

Second, the court of appeals defined the district court's authority to fashion effective relief for Respondents in the broadest terms. It acknowledged that "unique constitutional implications exist whenever a federal district court is asked to order a state entity to take regulatory action." *Id.* at 53. To that end, the court assumed that directly "ordering Volusia County to implement and enforce county-wide a 'turtle-friendlier' ordinance would violate the separation of powers." *Id.* at 54. Nevertheless, it found that the

district court has "a wide range of effective injunctive relief." *Id.*

> [T]he district court could strike Volusia County's ordained exemption of Daytona Beach and Daytona Beach Shores from [the Ordinance] . . . . Similarly, the district court could declare that those minimum standards, even if fully enforced, fail to prevent "harm" to protected sea turtles in Ormond Beach and New Smyrna Beach and . . . order Volusia County to form a committee and propose a solution.

Id. at 55 (citations omitted).

Following the Eleventh Circuit's decision and its denial of the County's petition for rehearing, *see id.* at 121, the County filed its petition for certiorari with this Court.

REASONS FOR GRANTING THE PETITION

THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT

"[O]ne of the strongest possible grounds for securing the issuance of a writ of certiorari," ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 174 (7th ed. 1993), occurs when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). "To justify a grant of certiorari, the conflict must truly be direct and must be

readily apparent from the lower court's rationale or result." STERN, *supra*, at 174. This is such a case.

A. The Eleventh Circuit's Decision Conflicts with the Court's Decisions Interpreting the Tenth Amendment

The Eleventh Circuit has decided that the County must proceed to trial on the question whether its Ordinance restricts artificial beachfront lighting strictly enough to prevent harm to sea turtles protected under the ESA. *See* Pet. App. 41. The County's only defense against liability on this point, according to the court below, is that the Ordinance in fact prevents sea turtles from suffering harm from such lighting. *See id.* at 44. It would be difficult to overstate the significance of the court's decision. A political subdivision of the State of Florida has been ordered to stand trial in federal district court to defend itself from liability under the ESA, and its only defense is that its regulation prevents all harm caused by artificial beachfront lighting to protected sea turtles within its borders. This decision simply cannot be reconciled with the decisions of this Court interpreting the Tenth Amendment.

1. The Constitution prohibits the federal government from commandeering state and local governments

The Tenth Amendment "reserve[s] to the States . . . or to the people," U.S. CONST. amend. X, all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." *Id.* The Constitution's delegation and reservation of powers between the federal government and the states

created a system of dual sovereignty, which divides power to preserve liberty. *See Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991). Whatever the other complications of our federal system—and they are legion—"the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992) (citation omitted). The Court has recently expressed this understanding in terms of a categorical rule:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Printz v. United States, 117 S. Ct. 2365, 2384 (1997).

The Court has consistently refused to permit the federal government to commandeer state and local governments for its own purposes. *See EPA v. Brown*, 431 U.S. 99 (1977); *New York v. United States*, 505 U.S. 144, 176 (1992); *Printz v. United States*, 117 S. Ct. 2365 (1997). Twice the Court upheld federal statutes only after determining that the challenged statutory commands did not breach this rule. In both cases, the Court upheld the challenged provision "only as a precondition to continued state regulation of an otherwise preempted field," *id.* at 2380. *See Hodel v.*

Virginia Surface Mining & Reclam. Ass'n., Inc., 452 U.S. 264, 288 (1981); *FERC v. Mississippi*, 456 U.S. 742, 764-65 (1982). Furthermore, even in these cases, the Court affirmed that it "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.* at 761–62.

Aside from fidelity to the political structure established by the Constitution, two reasons counsel against allowing the federal government to commandeer state or local governments. The first is to prevent the concentration of power, which endangers liberty. *See Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991). The second is to enhance political accountability.

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the view of the local electorate in matters not pre-empted by federal regulation.

New York v. United States, 505 U.S. 144, 168–69 (1992) (citing Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 61–62 (1988); LaPierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U.L. REV. 577, 639-65 (1985)).

2. The Eleventh Circuit's decision presents a genuine conflict with this Court's decisions prohibiting the federal government from commandeering state and local governments

The Eleventh Circuit's decision creates a genuine conflict with this Court's decisions at several points.

First, the majority below remanded the case for a trial on the question whether Volusia County has adopted a sufficiently "turtle-friendly" ordinance to prevent all federally protected sea turtles within its jurisdiction from being harmed by artificial beachfront lighting. *See* Pet. App. 64. The bare fact of such a trial, standing alone, poses a grave threat to our system of dual sovereignty and an intolerable intrusion on Volusia County's autonomy. If Congress transgresses the Constitution by presenting states with a Hobson's choice between "accepting ownership of waste or regulating according to the instructions of Congress, *New York v. United States*, 505 U.S. 144, 175 (1992), or by obligating state and local law enforcement officers "to perform background checks on prospective handgun purchasers," *Printz v. United States*, 117 S. Ct. 2365, 2383 (1997), then the Eleventh Circuit's decision is constitutionally impermissible on exactly the same grounds. Federal courts have no authority to compel state and local governments to choose between regulating to the limit of their authority or risking liability under federal law. "It is the very *principle* of separate state sovereignty that such a [decision] offends . . . ." *Id.* at 2383.[2]

[2] Moreover, neither the distinction between a congressional act and a judicial decision, nor between states and their political

(continued...)

Second, the Eleventh Circuit has, in effect, instructed the district court to conduct the trial in a way that heightens the constitutional offense. Those instructions include the repeated admonition to focus exclusively on the County's regulatory acts and omissions. Pet. App. 43-44. The majority took great pains to say that neither proof of third party acts nor the comparatively limited enforcement obligation of state and local governments under the ESA[3] would shelter the County from liability at trial. *See id.* at 47-52. Rather, the only defense available to the County, given the decision below, is that the Ordinance restricts artificial beachfront lighting severely enough to prevent take of all federally protected turtles within its borders—from any lighting source whatever. *See id.* at 44. And even that cramped defense appears illusory, since the district court has already found that "artificial beachfront lighting is responsible for the 'taking' of these sea turtles on the beaches of Volusia County." *Id.* at 113.

Third, to avoid the "unique constitutional implications," *id.* at 53, posed by Respondents' demand for an injunction ordering the County to prohibit all

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[2] (...continued)
subdivisions, eliminates the constitutional difficulties. The Tenth Amendment applies to all branches of the federal government, including the courts. *Strahan v. Coxe*, 127 F.3d 155, 169 (1st Cir. 1997), and the County has an undoubted right to raise its Tenth Amendment claim. *See Printz v. United States*, 117 S. Ct. 2365, 2382 n.15 (1997); *Board of Nat. Res. v. Brown*, 992 F.2d 937, 945–46 (9th Cir. 1993) (Clifford, J.).

[3] The U.S. Fish and Wildlife Service—not state and local governments—bears the statutory duty to prevent take of sea turtles caused by artificial beachfront lighting, and it has carried out that duty in Florida before. *See* Katherine R. Butler, Comment, *Coastal Protection of Sea Turtles in Florida*, 13 J. LAND USE & ENVTL. L. 399, 427 (1998).

"'harmful' lighting," *id.*, the majority below recommended two alternative remedies. The district court can "strike Volusia County's ordained exemption of Daytona Beach and Daytona Beach Shores from [coverage under the Ordinance]." *Id.* at 55. Or it can "order Volusia County to form a committee and propose a solution." *Id.*

Both remedies violate this Court's anticommandeering rule. That rule forbids the federal government to "issue directives requiring the States to address particular problems" or "command the States' officers, *or those of their political subdivisions*, to administer or enforce a federal regulatory program." *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997) (emphasis added).

Striking portions of the Ordinance that exempt Daytona Beach and Daytona Beach Shores from regulation would have the effect of commanding the County's officials "to administer or enforce a federal regulatory program." *Id.* But for the court of appeals' proposed judicial amendment, the Ordinance would not require the County to enforce the ESA by restricting existing beachfront lighting in those areas.

Ordering the County to form a committee and, in turn, ordering the committee to propose a solution falls afoul of both prongs of the rule. Such judicial orders direct the County "to address particular problems" and command County officials "to administer or enforce" the ESA. *Id.* Furthermore, this remedy leaves a substantial question unanswered. Can any solution proposed by the committee fully redress Respondents' claim—the Ordinance takes protect sea turtles by failing to adequately restrict

lighting—*without* amending existing beachfront lighting regulations or proposing new ones? Because the answer almost certainly is "not," an order directing the formation of a committee to propose a solution turns out to be an order either directing the County to make particular laws or to authorize lawmaking by judicial proxy. If Congress cannot foist such directions on states, *see New York v. United States*, 505 U.S. 144, 188 (1992), neither can federal courts.

For these reasons, the Eleventh Circuit's attempt to avoid conflict with this Court's decisions under the Tenth Amendment ultimately fails.

B. The Eleventh Circuit's Decision Is Sufficiently Important to Warrant this Court's Review

Aside from the evident importance of the conflict we have described, other factors establish that the decision below merits this Court's review.

First, this case turns on the interpretation of the ESA. As a comprehensive effort to protect wildlife from extinction, the ESA represents one of the most far-reaching federal environmental laws on the books. *TVA v. Hill*, 437 U.S. 153, 180 (1978). Its proper interpretation is therefore a matter of obvious importance.

Second, the Eleventh Circuit has given the ESA an interpretation that has broad consequences for the Act's enforcement, both within that circuit and across the country. The panel's decision dramatically expands liability under the ESA. Three members of this Court have already pointed out the legal and

practical defects of attaching liability to indirect *private* acts. *See Babbitt v. Sweet Home Chap., Coms. For Ore.*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting). The majority below has taken one long step further, stretching the ESA to embrace indirect *public* acts as well. *See* Pet. App. 41. The consequences of this decision for every state and local government in the Nation is yet unknown, but the consequence for Volusia County is clear. It faces liability under the ESA unless it agrees to adopt stiffer regulations or somehow persuades the district court to change course and rule that beachfront lighting does not presently "take" protected sea turtles within Volusia County. *See id.* at 43–44.

Third, the Eleventh Circuit's opinion casts considerable doubt on the ESA's validity. As we have discussed at length, the court's reading of the ESA puts the Act on a collision course with a recent line of this Court's decisions interpreting the Tenth Amendment. Whether the majority's decision is best explained in terms of oversight, *see* Pet. App. 114 (cataloging the district court's perceived constitutional difficulties with ordering the County to structure its regulations in a particular way), indifference, or failure to honor the principle of constitutional doubt, *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), the result is the same. And mentioning that the County did not directly allege federalism concerns, *see* Pet. App. 53 n.26, in no way relieved the court of its duty to interpret the ESA in harmony with the Constitution.[4] *See id.*

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[4] Nor does the County's reference to "the separation of powers," Pet. App. 53, rather than "federalism" or the "Tenth Amendment" (continued...)

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation urge the Court to grant the petition.

Respectfully submitted,

Galen G. Schuler
Perkins Coie LLP
1201 Third Avenue
40th Floor
Seattle, WA 98101
(206) 583-8442

Daniel J. Popeo
R. Shawn Gunnarson
Counsel of Record
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Counsel for *amici curiae*

March 18, 1999

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[4] (...continued)
foreclose it from raising a federalism claim before this Court. *Cf.* New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Eddings v. Oklahoma, 455 U.S. 104, 113–14 n.9 (1982).

(5)

Supreme Court, U.S.
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No. 98-1137

In The

Supreme Court of the United States

October Term, 1998

THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida,

Petitioner,

v.

LOGGERHEAD TURTLE (Caretta caretta); GREEN TURTLE (Chelonia mydas), et al., SHIRLEY REYNOLDS and RITA ALEXANDER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

JEFFREY D. KEINER
GRAY, HARRIS & ROBINSON, P.A.
Florida Bar No. 181678
201 East Pine Street, Ste. 1200
Post Office Box 3068
Orlando, FL 32802-3068
407-843-8880
Co-Counsel for Petitioner

DANIEL D. ECKERT
County Attorney
County of Volusia
Florida Bar No. 180083
123 W. Indiana Avenue
DeLand, FL 32720-4613
904-736-5950
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

5PP

ARGUMENT

Respondents rephrase the question presented for review, Opp. Cert. i, in order to contend that there are material disputed facts. Petitioner replies to show that the question is purely legal, and not factually dependent. Petitioner responds in limited measure to respondents' other reasons for denying the writ, but otherwise relies upon the argument in its petition.

Respondents state that their complaint seeks to enjoin petitioner from "affirmatively 'permitting' beachfront lighting." Opp. Cert. 6. The word "affirmatively" does not appear in the text cited by respondents. App. 179, 202. The complaint alleges that it is petitioner's "refusal to ban" artificial beachfront lighting which constitutes an unlawful taking of protected sea turtles. App. 161, 177. The claim for relief asserts that it is petitioner's "refusal to eliminate" artificial light sources that misorient sea turtles which constitutes the taking. App. 178.

Respondents further state that "nowhere in the pleadings do [they] contend they are challenging a 'failure to regulate.' " Opp. Cert. 5. The Eleventh Circuit apparently thought otherwise. It found that respondent had "standing to sue for inadequate *regulation*, the Turtles' core theory of causation." App. 43. The Eleventh Circuit directed the district court to determine whether petitioner's ordinance is "insufficient on its face to prevent 'harm,' " App. 44, and to "focus . . . on the regulatory acts" of petitioner. App. 43. It stated that where petitioner has not required retrofitting of existing lighting, "the trier of fact's inquiry can simply be whether the lack of artificial beachfront lighting restrictions causes

'harm' to sea turtles. . . . " App. 44. The causal connection contemplated by the Eleventh Circuit for " 'harmfully' inadequate regulation," App. 41, is therefore clearly based upon an absence, insufficiency, or laxity of regulation, and not affirmative permission.

The conclusions of the Eleventh Circuit regarding respondents' standing are ones purely of law. No facts are required to evaluate its logic that by a failure to prohibit, petitioner "purports to make an activity lawful." App. 47. No evidence is necessary to understand the premise that petitioner "ordain[s] beachfront lighting, allowing landowners to use lights. . . . " App. 47. This view of causation, where permission for individual conduct occurs because of the absence of local regulation, will not be given factual texture by a trial.

Respondents disavow their previously evident cause of action, while conceding that petitioner does not violate Section 9 of the Endangered Species Act, 16 U.S.C. § 1538, by a failure to act affirmatively, or to enact or enforce a federal program. Opp. Cert. 11-12. They acknowledge the constitutional limitations upon Congress recognized by the decisions of this Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 98 (1997). Opp. Cert. 11. But they argue strangely, in view of the Eleventh Circuit's decision, that the Tenth Amendment is not implicated because the statute contains no such requirement. Opp. Cert. 12.

Respondents have no obvious explanation why the Eleventh Circuit found it necessary to declare their standing to hold petitioner liable for " 'harmfully' inadequate regulation," App. 41, and no meaningful defense for its

decision. The decision of the Eleventh Circuit that petitioner seeks to have this Court review is clearly erroneous on the question presented, even if as in respondents' apparent view, it is based on an inaccurate understanding of the pleadings.

Petitioner could have more precisely raised to the court of appeals the question presented here. *Cf. Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995) (permitting new argument in support of consistent claim). The court of appeals understood though that petitioner's fundamental concern was that "*granting the requested relief*, that is, enjoining it from permitting 'harmful' lighting, *would be tantamount to ordering it to legislate* in violation of separation of powers." App. 53 [Emphasis supplied]. It was clear to the Eleventh Circuit that "unique constitutional implications exist whenever a *federal* district court is asked to order a *state* entity to take regulatory action. . . . " App. 53 [Emphasis supplied].

The Eleventh Circuit's seeming awareness of this court's decisions in *New York* and *Printz* is indicated by its reliance upon *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 119 S.Ct. 81 (1998). In *Strahan*, the First Circuit distinguished *New York* and *Printz* because there the state agency violated the law by expressly permitting the conduct which inevitably resulted in the harm, *Strahan, supra* at 164, 170, and was not being asked to take positive action. *Id.* at 170. Given the Eleventh Circuit's understanding that respondent's theory of causation is inadequate regulation, it seems an unduly tight reading by the court of petitioner's assertion of lack of redressability to not find *New York* and *Printz* to be "binding or persuasive authority to the contrary. . . . "

App. 55. The Eleventh Circuit should have applied the directly controlling precedent of *New York* and *Printz* even if it felt that the reasoning of other cases applied. *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 2017 (1997); *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Respondents suggest that review by this Court is inappropriate because petitioner may further legislate, or apply for the issuance of an incidental take permit. Petitioner does as a policy matter contemplate further legislation, but seeks to be relieved now, and in the future, from the threat of liability posed by the decision of the Eleventh Circuit that it must prevent harm to protected species. App. 44. Petitioner has in response to the Eleventh Circuit's decision, considered, but not made, further application for an incidental take permit. However, unless the Eleventh Circuit is correct that there exists a cause of action for " 'harmfully' inadequate regulation," App. 41, it appears unnecessary and wasteful of resources, for petitioner to submit its local authority to the enforced continuing scrutiny of a federal agency. The question presented by petitioner, whether a county government can be held responsible under the Endangered Species Act by a federal court for the acts of private citizens by its failure to regulate beachfront lighting, should be reviewed by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JEFFREY D. KEINER
GRAY, HARRIS
& ROBINSON, P.A.
FL BAR NO. 181678
201 East Pine St., Ste 1200
Post Office Box 3068
Orlando, FL 32802-3068
407-843-8880

DANIEL D. ECKERT, Esq.
County Attorney
FL BAR NO. 180083
123 W. Indiana Avenue
DeLand, FL 32720
904-736-5950
Counsel of Record